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Wisconsin. Supreme Court

WISCONSIN REPORTS

137

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

NOVEMBER 10, 1908 — JANUARY 26, 1909

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
JOSHUA ERIC DODGE
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES

Attorney General - - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

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MEMORANDUM.

Mr. Chief Justice WINSLOW took no part in the decision of the case of *Brown v. State*, reported herein on page 543, nor in the decision of those cases which are reported on pages 583 to 669 inclusive.

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IN MEMORIAM.

WILLIAM F. VILAS.

On the 5th day of January, 1909, Mr. Robert M. Bashford of Madison addressed the court as follows:

May it please the Court:—The committee appointed by the Dane County Bar Association for that purpose herewith present for record in this court a brief memorial of the life and services of the late WILLIAM F. VILAS, whose death occurred August 27, 1908.

Memorial of the Dane County Bar Association.

Born July 9, 1840, at Chelsea, Vermont, WILLIAM F. VILAS removed with his parents to Wisconsin in 1851 and settled at Madison. His father, the late Hon. Levi B. Vilas, was prominent as a citizen and as a lawyer, and for some years engaged in the practice of the law as a member of this bar. WILLIAM entered the preparatory department of the State University in 1852, and graduated therefrom in the ancient classical course at the head of his class in 1858. He at once commenced the study of law, graduated from the Albany Law School in 1860, and was thereupon admitted to the supreme court of New York and of Wisconsin. The training of his youth had been practical as well as academic, for during this period he had served an apprenticeship in a printing office, becoming a competent compositor, and also as clerk in a bank, acquiring a knowledge of the details of the business which proved of great value to him in later years.

Casting aside opportunities to engage in business, no doubt inviting, Mr. VILAS began the practice of law at Madison in July, 1860, his name appearing upon the calendar of the Dane county circuit court for that month as a member of the firm of Wakeley & Vilas. He was admitted to the bar of the supreme court on July 13, 1860, and argued his first case there at the January term in 1861 in the twenty-first year of his age. The case was of more than ordinary importance, and the brief and argument exhibited learning and research and must have created a most favorable impression upon the bench and bar of the state. The ability and zeal displayed in causes intrusted to his care won prompt recognition and gave assurance of a large and increasing clientage.

The professional career so auspiciously begun was cheerfully aban-

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doned by Mr. VILAS in the summer of 1862 upon the call of an imperiled country for additional troops to overthrow armed secession. With patriotic fervor he urged enlistments and raised a company of which he became captain and which was mustered in as Company A, Twenty-third Regiment, Wisconsin Volunteer Infantry. The regiment joined the forces under Major General Sherman, and took part in the engagements preceding the investment of Vicksburg, and participated in the conflicts and hardships that accompanied the protracted siege. Captain VILAS was promoted March 22, 1863, as major, and a month later as lieutenant-colonel, and was for several months in command of the regiment. In August, 1863, he resigned and returned home to take charge of important litigation in which his father had become involved. Colonel VILAS always retained a strong affection for his old comrades in arms, and he cheerfully devoted his time to service for their benefit, especially as a member of the board of trustees of the Soldiers' Orphans' Home, and as a member of the commission to erect a monument at the Vicksburg national park "in testimony of the important part performed and in remembrance of the heroic services, unselfish devotion, exalted patriotism and valor of Wisconsin soldiers who were engaged in the campaign and siege."

When Colonel VILAS resumed practice it was with the determination to devote himself exclusively to his profession, and he was soon engaged in many important cases, and his reputation rapidly extended throughout the state and the Northwest. He was doubtless greatly assisted during the early years of his practice by the wise counsels of his father, who was himself a lawyer of large experience and of great learning and ability. The success of Colonel VILAS at the bar did not, however, depend upon any fortuitous circumstances, but was founded upon his own talents, learning, and industry. He was richly endowed by nature in mind and person. His splendid presence would attract favorable attention anywhere. He had the physical strength to endure hard and constant labor beyond the ability of ordinary men. His great natural talents had been cultivated from his earliest youth by discipline and study, and his superior faculties, both mental and physical, were subjected to the control of a strong will and prompted to constant activity by an energy that was overpowering. No master was required to hold him up to his daily tasks; systematic application to the work in hand had become the fixed habit of his daily life. He did not waste time contemplating good resolutions, but devoted himself at once to their achievement. A man so equipped, guided by honest motives and inspired by high ideals, commands respect and confidence and the highest rewards of professional service.

Colonel VILAS was strong in the consultation room, quick to perceive the difficulties confronting him, and prompt in the suggestion

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and application of the proper remedies. He inspired confidence by his ready apprehension of the points in controversy, his clearness in statement of the law, and his forceful advice as to the course to pursue. He possessed in a marked degree the fundamental qualifications for a lawyer,—learning, judgment, and courage. An early client and an old friend remarked that Colonel VILAS was absolutely fearless when he thought he was right. However, his powers as an advocate and as a jurist gained wider recognition and he will be longer remembered for his efforts in the court room, contending for right and justice. Here he displayed force in a high degree, but he cultivated the gentle art of persuasion, and captivated juries by clearness of statement, by fairness in the treatment of controverted questions, and by eloquent appeals which touched the emotions and controlled the judgment of his hearers. He never relied merely upon his gifts as an orator in the trial of causes, but invariably made the most careful investigation both as to the law and the facts, and fully understood the difficulties with which he might be confronted. He was masterful in the court room, and went there prepared to overcome all opposition. His conduct upon the trial was a model, respectful to the court, courteous to his adversary, and considerate of the parties and witnesses, seeking no advantage that might not be gained by honorable contention. From his first appearance to his last, Colonel VILAS's presence was always welcomed by the courts, especially in cases of doubt or difficulty. The strong grasp upon the principles involved, the thorough preparation, the clearness of statement, the illuminating argument, all contributed to correct judgment and to the upbuilding of a system of jurisprudence that would stand the test of coming years. The services thus rendered in private causes were helpful to the courts and have left an enduring record of his professional learning and ability as a jurist.

The capacity of Colonel VILAS for hard work and intense application is illustrated by the labors he performed outside his regular professional engagements. In 1868 he became a member of the first faculty of the College of Law of the State University, and continued in that relation until 1885, giving nearly a half day every week to instruction in Pleading, Practice, and Evidence, besides the time devoted to preparation. The instruction given, reinforced by his example, was helpful and inspiring, and the impression made upon student minds will long survive the book learning then acquired. In 1872, 1873, 1874, and 1875, with his partner, General Edwin E. Bryant, Colonel VILAS prepared and superintended the publication of an annotated edition of the Wisconsin Supreme Court Reports, including volumes 1 to 20, inclusive, with the exception of the third and fifth volumes. In 1875 he was appointed by the supreme court as a member of the commission to revise the statutes of the state,

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and in 1878 a member of the commission to superintend the printing of the same. The revision was made with great thoroughness and accuracy by Colonel VILAS and his associates, the whole body of statute law being classified, condensed, and codified to the approval of the legislature and the bench and bar of the state. During this period of ten years he had not only performed his work in connection with the law school, and the editing of the Wisconsin Reports and the revision of the statutes, but he had conducted an extensive law practice in the state and federal courts and maintained a high standing in the front rank of the great lawyers of the Northwest. He declined tempting offers to remove to a large city to pursue his profession, but he remained steadfast to his first choice of location and to the friends and clients he had gathered about him. Space will not permit specific mention of cases in which he was engaged of general importance and of public interest, but it must suffice to say that he met the just expectations of all concerned in the conduct of causes in and out of court, and that he enjoyed in the largest measure success in professional pursuits.

In politics Colonel VILAS consistently adhered to what he considered the true principles of Democracy, though not always embodied in the platforms of the party. Demagogism in any form was detestable to him, and malfeasance in office was moral treason. During the early years of his practice he was too strongly wedded to his profession to engage actively in the direction of party affairs. On his return from the army in 1863, and in his absence from the state, a nomination to the Assembly was unanimously tendered by the Republican convention, but the same was declined in his behalf by his father; thereupon without his consent his name was placed upon the Democratic ticket for the same office. Fortunately for him he was not elected, and he continued his professional pursuits without the distraction of official engagements. From time to time Colonel VILAS attended Democratic state conventions and addressed the people on political topics. He was elected delegate from the state to the national Democratic convention in 1880, 1884, 1892, and 1896, and was permanent chairman of the convention of 1884, taking his seat as presiding officer on his fortieth birthday. He was chairman of the committee appointed to notify Governor Cleveland of his nomination at that time, and in the discharge of that duty made a most favorable impression upon the nominee and the Democracy of the whole country. Colonel VILAS refused the Democratic nomination for governor in 1877 and in 1883, and repeatedly declined a nomination for Congress at the hands of his party, once when he considered his election assured. Upon the resignation of Chief Justice DIXON, Colonel VILAS might have become his successor but for the opposition of his father, who thought it best for him, then in his thirty-fourth year, to continue in active practice, and thus was turned

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aside the opportunity for conspicuous and useful service on the bench, most inviting to an ambitious lawyer, and Hon. E. G. RYAN was appointed, rounding out a distinguished career at the bar by a more distinguished record as chief justice of the supreme court of Wisconsin.

In 1884 Colonel VILAS was nominated by the Democrats for the Assembly, and elected without opposition from the capital city district. He here rendered valuable service to the state, and was instrumental in passing a bill carrying the largest appropriation to the University that had ever been made, notwithstanding an adverse report from the committee on appropriations. He resigned to accept the position of Postmaster General in President Cleveland's cabinet March 4, 1885, returning to the state treasury the salary that had been paid at the opening of the session, in order that his successor might receive compensation without a special appropriation. The high esteem in which Colonel VILAS was then held by the people of the state was evidenced by the resolutions adopted by the Assembly which are here reproduced:

"WHEREAS, A respected and valuable member of this body and one of the most distinguished orators and jurists of the Great West has been chosen Postmaster General in the cabinet of President Cleveland: Therefore be it

"RESOLVED, That the members of this Assembly, a majority of whom are of opposing political convictions, as friends and citizens, embrace this as a fitting opportunity to place upon record a testimonial of their high appreciation of the personal worth, integrity, and ability of Colonel WM. F. VILAS, and to declare their belief that his advancement to the high position of a cabinet minister of the republic is as amply deserved by him as it is creditable to the judgment of the new President, who by this choice notifies the public that he has committed that branch of the government service which is nearest to the people to the hands of a clean, conscientious, and progressive statesman.

"RESOLVED, That the hearty well-wishes of this body and of the people of the state of Wisconsin go with Colonel VILAS to his new field of duty and responsibility, accompanied by the hope and belief that his future will be as creditable and successful as his past career, and will be as useful to his country as it will be honorable to himself."

Colonel VILAS served as Postmaster General until January, 1888, when he was appointed Secretary of the Interior by President Cleveland, holding the office until March 4, 1889, when General Harrison succeeded to the Presidency. He brought to the discharge of the duties of cabinet minister the same ability, thoroughness, and close application that had characterized his professional labors. He devised means for bettering the postal service, and the methods he introduced have been approved by the Congress and followed by his successors, and now prevail in every postoffice in the country. In the Interior Department, in addition to the onerous administrative

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duties, contested claims relating to the public lands were pressing for hearing and determination, requiring careful study and investigation to reach just conclusions. The decisions of Secretary VILAS prepared amidst the pressure of other responsible duties are recognized by the bench and bar as sound expositions of the statutes, and few of them were ever reversed. His rulings corrected loose practices that had grown up in the land office, swept away technicalities that tended to delay, and established a system that insured prompt and exact justice to settlers and others asserting claims to public lands.

In 1890 Colonel VILAS entered actively into the state campaign and greatly aided in the election of the Democratic state ticket and a Democratic legislature. He was chosen unanimously by the Democratic caucus as its nominee for United States Senator and was elected January 28, 1891, as the successor of Hon. John C. Spooner. He was eminently equipped by ability, learning, and experience to represent his adopted state in the highest legislative body in the world; and he at once took rank among his associates as a great constitutional lawyer and a constructive statesman. He was unanimously renominated by the Democratic caucus in 1897, but Hon. John C. Spooner was elected as his successor by a Republican legislature.

After his retirement from the Senate Colonel VILAS was never again a candidate for office, but he did not lose his interest in public affairs. He had been appointed a member of the Board of Regents of the State University in 1881 by Governor Smith, reappointed by Governor Rusk, and served until his removal to Washington in 1885; he was again appointed by Governor Scofield in 1898, and reappointed by Governor La Follette, serving as Regent until a successor was appointed in 1906. He was appointed by Governor Upham in 1896 as a member of the State Historical Library Commission, and served until the new library building was completed. He served as vice-president of the State Historical Society from 1898 to 1908. He was appointed by Governor Davidson as a member of the Wisconsin Capitol Commission in 1906, and rendered active and effective service in the erection of the new building up to the time he was stricken with his fatal illness. The repeated appointments to responsible positions by the chief magistrates of the state of opposite political views are the highest tributes to the character and ability of Colonel VILAS and to his fidelity and efficiency in the discharge of public trusts.

As a popular orator Colonel VILAS early took rank among the most gifted of his countrymen. Among his most celebrated efforts was the notable address he delivered at the reunion of the Army of the Tennessee at Chicago in November, 1879, in response to the toast to its first commander, General Grant, who had just returned from

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his triumphal journey around the world. General Grant himself was present, and there were in attendance prominent officers of the army and navy and distinguished citizens from all parts of the country. The effect of the response was electrical and Colonel VILAS received a tremendous ovation, the demonstration surpassing that following the response to a toast by Colonel Ingersoll, then considered the most brilliant orator in the country.

Colonel VILAS had a keen instinct for business and a marked capacity for the conduct of large affairs. He was identified with a number of financial institutions and with lumbering, manufacturing, and other industrial enterprises in this state and in the Northwest, and all his undertakings were crowned with success. He mastered the details of every concern with which he was connected and contributed by his personal efforts to its growth and development. He loved the pursuit and acquisition of wealth, not for its mere possession, but for the enlarged opportunity it afforded to benefit mankind. He loved his fellow men and planned on a large scale for the upbuilding of society. His purse was not open to importunate solicitations for supposititious needs or for weakly founded charities of questionable benefit. He did not, however, withhold his generous aid from those whom he knew to be in need, and one closely associated with him during the last year of his life states there were numerous instances of which the public never heard, where he rendered substantial assistance to those in distress. Colonel VILAS stood upon a high plane and took a broad view of humanity and its needs, and formed his own designs for the bestowal of his bounties. He saw the needs of the church with which the members of his family were connected for a meeting place for social and other gatherings, and generously erected a guild hall as a memorial to a loving daughter who had departed at the threshold of a beautiful life. He appreciated the importance of public parks for a populous city, and with liberal hand provided a permanent place for recreation for the people of this and succeeding generations, as a testimonial in remembrance of a son who was taken away as he was just entering upon a career of usefulness and promise. He had devoted valuable time and labor during the active years of his life to the upbuilding of the State University, and fully understood its needs and its opportunities for great usefulness in the future, and in the final disposition of the large wealth he had accumulated by toil and sacrifice endowed the institution he had so fondly cherished with the means to carry forward its great mission for the enlightenment of the people and the advancement of the state. His whole life is an example to others, and his final benefaction an inspiration to his fellow men and to those who shall come after.

WILLIAM F. VILAS was cast and tempered in no common mold, and in every relation of life measured up to the full stature of a great

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man. Nature and training qualified him for the highest service as a citizen, in his profession and in the public stations to which he was called; and his whole life was devoted to ennobling pursuits for the upbuilding of society and for the permanent advancement of mankind. His memory will be cherished as long as our institutions shall endure, and his labors and sacrifices will serve as a constant influence for better thoughts, better words, and better deeds to the generations who shall share in his bounty and move forward upon the beneficent foundations he has so generously provided.

ROBERT M. BASHFORD,
For committee consisting of
BURR W. JONES,
GEORGE W. BIRD,
ROBERT M. BASHFORD.

Mr. James G. Jenkins of Milwaukee then spoke as follows:

May it please the Court:—The value of a life is not to be measured by the degree of its success, as success is commonly defined. By that standard, failure may in truth be victory, success defeat. It is the actuating motive of the life, the use of the life made by the liver, and the force of the life as an example, which determine its worth.

In the estimation of the world of his day, the career of the Man of Nazareth was a dismal failure, ending in an ignominious death; but the standard of conduct declared by him has proven the leaven which bursts the shell of selfishness and which will avail to stay relapse into barbarism. The despised and the outcast of his time is today the foremost figure in history, the beacon light of humanity.

He who acquires great possessions is in the eye of the world a successful man; but he may be merely the vulgar miser whose life is worse than useless. The man of study, the man of science who reserves for mere personal enjoyment and use the knowledge acquired, comes short of the correct standard of the value of life, and is of little moment to the world. It is by spending that one can save. It is by giving that one can have. By this is not meant indiscriminate distribution, but that wise, practical spending and giving which benefits humanity and enriches the giver in those things which make for character and worth.

By this better standard, let us measure the value of the life of him in memory of whom we are this day assembled.

Of great natural ability, enriched by liberal education and graced by culture, he entered upon the struggle of life well equipped. Possessed of power of concentration, of love for persistent labor, of thoroughness in all things attempted, of a large measure of practical common sense, of capacity to comprehend the force of conditions

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and to forecast results, of great physical endurance, there was from the beginning no question of his success.

He was a lawyer, able, painstaking, studious, quick to discern the essential principle involved and forceful in its presentation, loyal to his client, fair and respectful to the court and to his opponent. In the arena of legal strife he was an adversary to be feared. His careful study and preparation discovered all possible attack and made defense formidable.

He was a soldier, loyal, brave, prudent, resourceful, demanding strict obedience from subordinates, submissive to superior authority.

He was a statesman, broad minded and liberal, devoted to those principles of government which he deemed essential to the welfare of his country, and, when principle was involved, yielding nothing to political expediency. He was not of the type of men who deem legislation the sovereign cure for the ills of state. He went rather to the root of the disease and sought to inculcate the true principles of self-government which alone could eradicate the evil. He did not believe in paternalism in government. He thought an educated restraining will power more effective than compulsory repression. He sought to teach men self-government, to govern self by correct principle as the true basis of independent, manly, American citizenship. He could not pander to the howlings of the mob. He appealed to reason, not to the hysterical passion of the hour. And so, when fever had spent its force and reason reassumed its sway, he was acknowledged a real friend of the people, teaching attachment to principle and obedience to law as the surest safeguard from anarchy and disaster.

He was a man of business, displaying wonderful sagacity, great practical common sense, boldness, but boldness far removed from rashness; and so in a comparatively brief period he acquired wealth.

Thus in common acceptation he was in all respects a victor in the battle of life; one of the foremost lawyers of the state, a soldier of the civil war, a Regent of the University of Wisconsin, a cabinet officer, a Senator of the United States, a successful business man.

But all that might not avail to declare his life a valuable life. Before we may so assert we must discover the actuating motive of his life, the use made of it, and its value as an example. We find that motive, as I conceive, in his devotion to duty, in his desire to be useful to others.

In all the positions to which he was called, in all the work which he undertook, he applied himself to the discharge of duty with an energy which knew no flagging, with a devotion which knew no turning; sparing neither himself nor others that faith might be kept and duty performed. This characteristic runs through all his life and illuminates all his work. He was, it is true, ambitious, but it was the noble ambition to excel. He desired place and power, not

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from sordid motive, but for the opportunity they afforded of usefulness. He sought to aid his kind by teaching them and helping them to help themselves. He recognized the truth that indiscriminate charity is hurtful both to the giver and to the receiver, and that that is the true charity which aids to build up independence of character and self-reliance. With wise statesmanship, he saw that the best remedy for the ills of government, the true safeguard from the evils of passion and prejudice, the sure foundation for manly independence of character and good citizenship, the anchor which can hold in safety the Ship of State in the storms which beset her, the main essential of success for the individual, is education. And so, by the crowning act of his life—an act which discloses the actuating motive of his life, devotion to duty, usefulness to man—he gave his fortune to the cause of education. The act is unique in the history of the state. He there disclosed the predominant motive controlling and guiding his conduct. His life furnishes an example for men to copy, an example that for generations will be forceful and fruitful of good, inspiring to deeds really great and useful to mankind.

Men come and go, and in the wild rush of life the dead are soon forgot; but so long as the great University of the state of Wisconsin shall remain to instruct and equip men for the struggle of life, the name of WILLIAM F. VILAS will endure as an example of noble living and of noble giving; an instance of a useful life, devoted to duty and to the advancement of civilization. When marble shaft shall have crumbled and his last resting place be no more known among men, his name will be held in grateful memory by generations yet unborn, who shall share in the benefits of his wise forethought and his princely benefaction to the cause of education.

Here we shall see his face no more. His eloquent tongue is silent and shall plead no more at the bar for right and justice. No more may his country profit by his wise counsel. No more may the state receive the advantage of his intelligent labor. He is gone, and yet

> Nothing is here for tears, nothing to wail
> Or knock the breast, no weakness, no contempt,
> Dispraise or blame, nothing but well and fair
> And what may quiet us in a death so noble.

In the helplessness of loss, faith born of longing whispers the hope—may it not prove illusive—that in a higher sphere of life he awaits our coming. If so it be, Oh, wise and considerate friend,

> We've been long together,
> Through pleasant and through cloudy weather.
>
> . . . . . .
>
> Say not "Good night," but in some brighter clime
> Bid me "Good morning!"

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Mr. Pliny Norcross of Janesville then addressed the court:

May it please the Court:—If a man could pick out his birthplace with reference to subsequent success in life, he would be quite likely to select some spot in the highlands of Vermont or New Hampshire. From the long list of famous men who first saw the light in that favored locality I select a few: Daniel Webster, Horace Greeley, Stephen A. Douglas, Lewis Cass, Salmon P. Chase, Franklin Pierce, Levi P. Morton, Senator George Edmunds, Matthew H. Carpenter, and Admiral George Dewey. To these chosen few I add the name of our lamented friend, WILLIAM FREEMAN VILAS,—born at Chelsea, Vermont, on the 9th day of July, 1840. For strength of intellect, for the power of magnetic eloquence, for a broad grasp of state and national affairs, for sublime courage, for the hope and desire of serving his state and his country faithfully and well, he was a fitting companion of any of the great men whom I have named.

The Vilas family came from Vermont to Madison, Wisconsin, in 1851, three years after the state was admitted to the Union. That family has been identified with the growth and prosperity of this state for more than a half century. The father, Levi B. Vilas, was a lawyer and a judge in his native state, so that his son Colonel VILAS received by inheritance a taste and desire for the law. When the son graduated at the Albany Law School in 1860, at the age of twenty, he had simply fulfilled the hope of his boyhood ambition.

No man ever was more sincerely devoted to the profession of law than he. He consecrated the intense energy of his early life to that pursuit. Of course he was successful from the outset. He was reluctant to give it up, even when his country called upon him, as upon every other young man, to surrender his dearest hopes and even life itself in her defense; but when he made his decision there was no further delay.

He possessed all the qualities of a good soldier. He very soon rose to the rank of a field officer. The life of such an officer in an active campaign has many very attractive features, and especially so if the officer is brave and ambitious. The love of authority, the spirit of daring adventure, take full possession of such a man. To be in command of a regiment at twenty-three years of age, under the most famous general of the late war, in the most wonderful campaign of that war, and to be associated with other bold and daring officers, was of itself honor and glory enough to have turned the head of a veteran commander. Colonel VILAS bore a conspicuous part, not only in the siege of Vicksburg, but he shared in the fierce and desperate battles which preceded the siege. To be with such a general as Grant was a discipline in all the stronger traits of manhood. No officer ever carried a sword who was inspired with more of the spirit of chivalry than he. He was a Green Mountain boy. He knew by

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heart the story of Ethan Allen and the Continental soldiers who captured Ticonderoga and Crown Point. He had imbibed, as only a boy can, the spirit of such an adventure.

The charm of an officer's life did not win him from the real mistress of his heart—the Law. Unexpectedly, duty called him to resign his commission. The fact that he did so, when Fame beckoned him to higher position in the field of war, illustrates the strength of his character. He resumed his practice, and from that time his career as a lawyer grew stronger and brighter as the years passed on. Oftentimes, as I have seen him conduct the trial of a case before a jury or a judge, I have been reminded of the descriptions of tournaments and plumed knights as given by Sir Walter Scott. In a certain sense, a passage of arms between knights of the feudal ages is very suggestive of a well fought lawsuit. The pleadings present the lines within which the legal battle must be fought; the rules of evidence and practice and the decisions of the courts are the weapons to be used. Up to this mark the contest is substantially *even* for all contestants. Patience and industry will secure nearly all the vantage ground to be gained on either side. From this point, however, the struggle depends very largely upon the personal qualities of the attorney, such as strong confidence in himself, valor, courage, courtesy, generosity, and dexterity in the use of his weapons, and if, in addition to these important qualifications, he is inspired with the high-born spirit of chivalry, so that the success or the defeat of his client is glory or shame for him, then an ordinary trial in court changes from the dull, monotonous routine of questions, answers, and citations, to a brilliant exercise of intellect, where knowledge of the law, wit, and eloquence have complete sway. There will be the thrust and parry, the charge and counter charge, in which the lance of the mounted cavalier is replaced by the sharp, incisive, eloquent tongue of the advocate. The judges are the umpires and compel compliance with certain established rules. The court room has some things in common with the tournament and lists of the Middle Ages.

I think that I state the fact very mildly when I say that Colonel VILAS, during the twenty years of his active practice, prior to 1885 when he was called to President Cleveland's cabinet, was as worthy an advocate in the broad field of general practice as ever graced the state or federal courts of this state,—either before a jury, or in the more formal and dignified presence of the court of appeals.

He had accurate, strong memory, he took a quick grasp of all the facts and details, and he knew the law applicable thereto. He was very familiar with the rules of practice and evidence. His voice was clear and resonant and had a convincing quality about it. He had unbounded good nature and the grace of hearty courtesy to witnesses and opposing counsel and the court. Year by year he grew in

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strength and wisdom. There was always an air of hearty good-fellowship about him. He was a most winning and delightful person in a court room and when engaged in a trial.

What a wide contrast there is in the manner of presenting a case for trial! It is no disparagement to any man to say that some attorneys cannot create any interest in a trial, and that others cannot try a case without awakening a lively interest. What is the secret? Is it in the voice of the advocate? Is it the thrill of magnetic influence, which like a current of electricity permeates every nerve and fibre of the body? Is it in the selection of words or phrases? Is it in the will power? Or is it some mysterious quality of mind and heart which is beyond the control of the speaker himself? How did Lord Erskine, when a very young man, just admitted to the bar, speaking from the back seat of the court room after all other barristers had been heard, present the defense of Captain Baillie with such power and pathos as not only to win a judgment, but so as to place himself at once in the very front of English advocates? How did Webster, in the Dartmouth College case before the supreme court of the United States, Chief Justice MARSHALL presiding, not only secure a reversal of the judgment of the state court, but in his final appeal present the cause of his *alma mater* with such resistless power that the dignified judges were spellbound, fascinated, enchanted?

How did Colonel VILAS at Chicago, in his address of welcome to his old commander, General Grant, win the favor and plaudits of every listener, and create for himself at once a national reputation as an orator? Again in 1885, on the floor of the Assembly in this city, he supported a bill for an appropriation to build "Science Hall." The sentiment of the members was not favorable to such a large outlay. The University was not so strong in the hearts of the people as now. For an hour he portrayed the needs of the University,—the demand for broader culture and for a wider scope of general knowledge among the whole people of the state; then he presented a statement of the struggles and reverses of the University in its early years; and finally gave his own experience as a student. No one who heard that speech can ever forget it. It was given in a good cause. It was a rare combination of fact, hope, sentiment, and pathos. It resulted in a liberal appropriation, and the great University and its beautiful surroundings stood in a new light after that address. The feeling of indifference among the legislators changed to a feeling of respect and pride. He had vanquished all opposition.

How is it that all juries and judges in our state and federal courts, who have listened to him, bear such uniform testimony to his power, his eloquence, his lucid, convincing argument?

The reason therefor is found in the physical, mental, and spiritual make-up of the man himself. It is a rare gift of the Divine Creator.

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When a man has it as Colonel VILAS did, he is more powerful than an army with weapons and banners. Possessing that gift in a very large degree, together with untiring energy and the lifelong habit of hard work, he became while yet a young man one of the strongest and most successful lawyers of this country. In addition to that gift and habit he had what is very rare among orators—most excellent judgment in all matters and methods of business. Thus equipped, he was the only man in this state who was ever transferred from his private law office to the President's cabinet. Under his management as Postmaster General he improved the department greatly. He was not content to be simply the holder of a very important office, but he labored intensely and incessantly to make that branch of the public service as efficient and valuable as possible. Later he was transferred to the Interior Department, and again he bent all his energy to the improvement of national affairs.

A year or so after his labor in the Cabinet was ended the legislature of this state selected him for the United States Senate, at a time when the financial policy of our government was in a condition of dangerous uncertainty. During Cleveland's second administration he was one of the strongest and most valued supporters of the President in his effort to secure a safe, conservative financial policy. To his sound, clear judgment, and to his persistent effort in the face of bitter opposition by some of his party friends, this nation is largely indebted for the firm foundation upon which our financial policy now rests.

His active and useful career as a statesman ended with his Senatorial term in 1897. The Democratic convention of 1896 closed in practical disruption of his party. He urged the adoption of some very important principles in the platform. They were overruled, and he returned to private life.

I do not know why he gave up his profession at this time—when he could have enjoyed a most successful practice, but there are some facts which may have influenced him. The twelve years of unremitting toil in the service of the state and nation and as a prominent leader of his party had impaired his health. One of his daughters died while he was Senator. His only son passed away shortly after his term ended. Only one child remained. His large business interests, long neglected, claimed his attention. Possibly his ambition to win a still greater record at the bar did not appeal to him as strongly at the age of fifty-eight as it did in his younger days. Perhaps the glory or glamour of fame had lost some of its luster for him. I am persuaded, however, that he never lost his love for the profession in which he had achieved such great success. But few men were so well equipped for the practice as he. Nature had endowed him very richly,—and he was a most untiring student,—

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and a most delightful teacher of law at the University. For some reason he gave up the active practice.

I think the state gained thereby. During the last decade of his life he was one of its most useful, public-spirited citizens. He could not be idle. He was not built for leisure, and so it came to pass that he found real pleasure in doing good things for his home city, and in planning broad schemes for the benefit of the state. From early boyhood he had been a leader, whether at the bar, in legislative bodies, in the Cabinet, or in business. In his declining years he was glad to give his service to the needs of the state. I am sure that he took great delight in planning for a broad and more accessible culture at the State University.

He was arduously engaged in the service of the state when a sudden stroke disabled him and ended his active, useful life. During the few weeks that he was prostrated he was the object of tender sympathy from friends all over the Union. He became the center of the people's hope, love, and prayerful interest. But recovery was not to be. The people of this whole commonwealth knew him, loved him, and now regret his death. We miss him not only in the court room, where his voice has been heard so many times with marvelous influence, but everywhere about the city and state. In fact this city seems lonesome without him.

We honor and respect him for his great achievements as a lawyer, a statesman, and a public benefactor. Those who associated with him will always cherish the memory of his delightful presence and companionship. With sincere, heartfelt sorrow, we say farewell, and fare *thee* well, and if forever, still forever fare thee well.

Mr. A. R. Bushnell of Madison then said:

May it please the Court:—As one of the older members of the Wisconsin bar who knew our deceased brother Colonel VILAS throughout all his connection with it; and as a comrade of his in the Union army of 1861: as a colleague of his in the Fifty-second Congress of the United States, though in the House and he in the Senate; as one who always enjoyed his friendship and often profited by his kindly acts done in my behalf, sometimes in ways unknown even to myself until long after the fact; as a great admirer of his commanding ability and ample capacity for whatever he undertook as a lawyer, soldier, statesman, business man, good citizen, patriot, and lover of his fellowmen, I trust it will not be deemed inappropriate that I, here and now, add a brief and humble tribute to his memory.

It is chiefly as a lawyer that we ought on this occasion to regard the memory of Senator VILAS—or Colonel VILAS, as I love best to name him; and as such he stood pre-eminent. But to the lawyer no field of knowledge and usefulness comes amiss and he should be

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always and everywhere a patriot. It was the fortune of Colonel VILAS to be called to other scenes of activity, where he came in contact with some of the most eminent minds of his day; and nowhere did he fail to fully meet the requirements of the occasion. He did not hesitate to risk his life for his country in the day of her great peril. In the army and on the battlefield he was a brave soldier, and always had the love and confidence of his brother officers and of his men. In the halls of Congress, in the cabinet of our nation's chief executive, and on the platform, he was a most eloquent and convincing champion of the rights and interests of the people, and stood among the foremost molders and controllers of thought and action.

But much as we admired him as a lawyer, soldier, statesman, it is the life he lived among us here at home in Wisconsin, and in Madison, the place he here filled, and what he did here, that we have mostly in mind at this time. Born in Vermont in 1840, a state often said to be a good place to emigrate from, he came to Madison with his father, Judge Levi B. Vilas, and his family in 1851. He was chiefly educated in our common schools and our own University. To his inheritance of New England thrift and frugality he added a correct business judgment and a vast capacity for business, through which he was enabled to accumulate one of the largest fortunes in the state. But it is not by the vulgar standard of money that we would measure the worth of our deceased brother, but by his sterling qualities as a man, and what he did, in this good world of ours, for himself, for those around him, his country, and his fellow men.

To those who would make a show and parade in the giving of charity, Colonel VILAS's purse strings were often tightly drawn. But in the quiet and judicious giving of his money and services for the relief of those in real need, for the good of the state, and in broad and comprehensive charities, he was most liberal.

And so it was that when he felt his physical powers failing, and the end of his earthly journey came in view, the master motive of his life assumed its sway, and he devised that grand scheme of beneficence to his fellow men embodied in his last will, by providing, first for his family, and then that his great fortune should go on accumulating and be devoted to the upbuilding, perpetuity, and usefulness of the University of Wisconsin.

What could have been a more gracious consummation of a noble life? The results of all his labors finally go and are devoted to the good of his fellow men.

"Abou Ben Adhem (may his tribe increase!)
Awoke one night from a deep dream of peace,
And saw within the moonlight in his room,
Making it rich and like a lily in bloom,
An angel writing in a book of gold.

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William F. Vilas.

Exceeding peace had made Ben Adhem bold,
And to the presence in the room he said,
'What writest thou?—The vision raised its head,
And with a look made of all sweet accord,
Answered, 'The names of those who love the Lord.'
'And is mine one?' said Abou. 'Nay, not so,'
Replied the angel,—Abou spoke more low,
But cheerly still; and said, 'I pray thee, then,
Write me as one that loves his fellow men.'
The angel wrote, and vanished. The next night
It came again, and with a great wakening light,
And showed the names whom love of God had blessed;—
And lo! Ben Adhem's name led all the rest."

In the great book of gold, the account of Colonel VILAS's life is closed. No fear but that his name therein is written high up in the roll of those "whom love of God had blessed;" and that his debits, if any there set down, are balanced in full by the final entry of "Well done."

What though the provisions of his will are so framed as to make for himself and family a name and fame that shall be perpetuated down through all the coming generations of our state! The desire to be so remembered, when sought by such methods as those which he employed, is a most noble and laudable ambition. And it is not from what he has bestowed, alone, that mankind may hope to profit by his example. To all the possessors of great wealth he has pointed out and elaborated the way, and said, "Go thou and do likewise."

This bar, this city and community, his business associates, and the state of Wisconsin, will long cherish the memory of Colonel VILAS, and deeply mourn his departure. We are prone to think that his passing over the river, and within that dark shadow which swallows up all things human, came all too soon. What might have been, had he lived longer, only the eye of Omniscience can fathom. In view of what is, and what might have been, it may well be that he himself would not regard his departure as untimely. As it is, we that are left, his state and country, had and enjoyed all the benefits which his great learning and faculties could give, without stint or diminution, up to the time he was stricken with his last sickness; and by his will he has made us all his heirs.

We cannot doubt that all the officials of Wisconsin and of our University will have the wisdom and integrity to faithfully administer and carry out the scheme of Colonel VILAS's great benefaction, to its full fruition, as so elaborately planned and directed in his last will. Failure in the most earnest and persistent efforts so to do would justly bring upon them the execration of all good citizens.

Colonel VILAS, in his life's work, seems to have learned well the lesson that the great secret of human happiness lies in doing good to others; and that man always does the best he can for himself

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when he does the best he knows for his fellow man. And so, in that life work of his he has builded for himself a monument more lasting than bronze or granite; more sublime than the regal elevation of the pyramids; which neither the wasting rains, the dissolving frosts, and ice and snows of winter, the fierce tornado or northwest blizzards, or the innumerable succession of years, with the changing flight of seasons, shall be able to demolish.

May he rest in peace; and God keep his memory green!

Mr. Neal Brown of Wausau then spoke as follows:

May it please the Court:—The task of the eulogist is not always an easy one. It is difficult to weigh and estimate in due proportion the character of the dead and not be influenced by the sense of personal loss. Yet here, in this remembrance of Colonel VILAS, we can freely and without constraint voice with like earnestness and truth the affection of deep friendship and our respect and appreciation for him as a distinguished figure in our public life.

Shakespeare has said that men's faults are written in brass; their virtues in the running water. But in this record of the worth of our dead friend we can perpetuate no testimony of weakness or shame. He was a strong man among strong men. With men of distinguished citizenship, he was easily among the foremost. His most striking characteristic was his great efficiency. As soldier, scholar, orator, statesman, lawyer, and man of affairs he was equal to all tasks, and he settled all problems with the hand of power.

I think it was Lowell who has told of how he felt when the news came to him of Webster's death. He said that for many days he suffered an acute sense of personal and irreconcilable loss; as if a mighty personality had been removed from the earth, leaving a great void: the sky was shadowed and the world, with Webster gone from it, seemed meaner and smaller.

So, I think, we all felt when we heard of the death of Colonel VILAS. For us, who loved and honored him living, his place in this commonwealth cannot be filled.

Mr. Burton Hanson of Milwaukee was unable to be present in person, but forwarded the following tribute which was ordered to be incorporated with the proceedings:

May it please your Honors:—I knew Colonel VILAS for more than a third of a century, and accounted him among the best of my friends. To have known him and enjoyed his friendship was a privilege to which any one might well look back with the deepest satisfaction. I was a student in the office of Mr. Cottrill, with whom Colonel VILAS was associated as one of the revisers of the Statutes of 1878, and there, at my very entrance upon the profession which

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Colonel VILAS had already adorned with such consummate ability and distinguished services, he gave to me that kindly interest and genuine friendship which, from the older and successful practitioner, has always been such signal help and encouragement to the young lawyer, with all his future before him.

Colonel VILAS was always devoted to the highest ideals of our profession, and he regarded with utmost seriousness the hopes and ambitions of those who chose to give their lives to its activities. And it is probable that no finer tribute can be paid to his memory than the gratitude of those to whom, in their youth in the law, he gave the impetus of sympathy and encouragement. Among these I count myself, and it would be difficult to estimate the influence upon my after life which the generous and kindly interest he gave me in those early days has been in forming my respect for the traditions of the profession, my admiration for his achievements and the consequent ambition to live as near as might be to the ideals which his early friendship impressed upon my life.

And Colonel VILAS, as a lawyer and as a citizen, might well inspire in youth the highest ideals. His career in the practice of his profession is a tribute to the persistence of industry; and industry, after all, is genius. He mastered his cases, and his learning illuminated the records of this and many other courts. He served his country in the hour of her need with the fidelity and devotion that he gave to his profession, and rose in that emergency to the distinction which his personality always commanded. In the civil and administrative councils of the state and nation he attained a high position, and gave to the administration of government the benefit of his wisdom and experience.

But perhaps better and greater than all these successes and triumphs was the position he occupied as a private citizen, when, having laid aside many of the activities through which he had won distinction, he came to spend the later years of his life among his neighbors and his friends in the fullest measure of their confidence, respect, and esteem. While it is the personality of the man that wins fame and position, at the final analysis the personality is worth more than the distinction which it wins. And of Colonel VILAS, after all the important history of his life is written, it may be added beyond and above everything else, that he merited and held the confidence and respect of every one, and commanded to an unusual degree the deep affection of his fellow men.

The calm, strong mind, the stately equipoise, the broad equity, the inspiring truth, the wonderful personality and commanding presence of Colonel VILAS have left their impress upon us all, and he will not soon be forgotten. The characteristics which he possessed in such marked degree, he exemplified in that every-day life whose burdens we bear and whose vicissitudes are to us such a mystery.

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On behalf of the court Mr. Justice DODGE responded:

With the death of WILLIAM FREEMAN VILAS terminated a career almost without parallel for brilliancy of achievement in various fields of action, for conscientious devotion to high ideals, and enthusiastic and beneficent service to his fellow men. I falter in presence of the duty to attempt even the most formal characterization of the man or the life. Would that his own illuminating eloquence might be brought to the task!

Primarily, of course, this court and its bar appreciate and may fittingly memorialize the services of Mr. VILAS as a lawyer, devoted to the establishment and administration of a system of jurisprudence which shall, so far as lies within the powers of finite human nature, assure justice, and equality of right and opportunity, to all. In that field he was magnificent. With complete and lucid comprehension of those great fundamental principles of right and justice on which all law must rest, and of those rules of the common law which the experience of centuries has established as essential to the practical efficacy of its principles, his powerful and accurate intellect enabled him to discriminatingly make application of those principles and rules to concrete situations, and his impressive diction and crystalline clearness of argument gave to courts the enlightening aid of his thought and learning in every case. But while unexcelled as an advocate and always zealous that the best word should be said, the most convincing reason urged, for his client's cause, he was ever the true lawyer, the devoted and loyal champion of *the law* in its most perfect purity and integrity. His creed and guiding principle was feelingly spoken to the law class of 1876, where, likening the law student to the aspirant for knighthood in the days of chivalry, he said:

"The obligations of knightly duty, the qualities of heart and mind which shone in the cavalier in an age of war, are typical of the obligations of the lawyer's duty and the qualities which make him illustrious amid the tribulations of peace.

"Beginning with the beginning of human judicature, the profession of the law has risen, in character and usefulness, with the growth of perfection in the law. As justice is more exactly administered, its administrators increase in honor. As human law approaches more nearly the discovery of its Divine pattern, its ministers come to wear the livery of the servants of Heaven. Thus its chart of honor lies in its very position. Whatever else may be good, whatever dignified, whatever honorable, it cannot be denied to this profession, that all the affairs of men yield no pursuit which can surpass it in the excellence, the dignity, the honor, which its very nature demands."

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William F. Vilas.

To such principles as these he was ardently devoted, and amid the engrossing practical labors of an exceptionally busy career his acts in exaltation and perfection of the law itself have been many, far too numerous to be catalogued here. A few may be mentioned:

Admitted to the bar of this court in 1860 while still in his nonage, his professional career was interrupted by patriotic and distinguished military service in the civil war, after which he resumed his chosen profession with all ardor. In 1868 he, in association with others, laid the foundations of that College of Law which has been, and is, so potent an influence for the elevation of legal education and ideals in this and other states, and to that school he gave nearly twenty years of valuable service. In 1874, in collaboration with his partner of beloved memory, Edwin E. Bryant, he gave to us an annotated edition of the reports of the decisions of this court of such completeness and accuracy that it has ever since been standard. In 1877 he, in association with others, performed the monumental work of compiling and originating a scientific and comprehensive revision of the entire statute law of the state, which is still the model and design to which all subsequent legislation is but addition, amendment, and modification. Nor can we fail to commemorate his uniform enthusiastic response to every call upon his effective advocacy, unselfishly and disinterestedly given in aid of whatever might promote the comfort, convenience, dignity, or respect of this court; of which, as should be remembered, he was invited to become the Chief Justice in succession to Chief Justice DIXON in 1874.

Not content with labors in the professional field, enough to fill an ordinary life, he was imbued with zealous sense of civic duty, which, in her citizens, must ever be the anchor of hope for the success of our republican government. This sentiment he spoke in characterizing the ideal lawyer, thus:

"Nor ever will he sit in honor with the benchers who reckons the law but a trade, secludes himself from public affairs, and peddles to his selfishness the service he owes the country whose laws he professes to administer."

He spoke it again and again in deeds through life. Breaking his career almost at its threshold, he gave the early years of his manhood to military service in the hour of his country's need. The following years of active professional labors were characterized by such services to the profession and the community as have been mentioned, and by ever recurring response to demands on his abilities and eloquence as writer and orator in aid and support of plans and policies for public welfare, both political and nonpartisan. Many years were given to the care and advancement of the University as Regent and otherwise, and such services were never of the perfunctory nor merely advisory type, but thrilling with ardor and devotion

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which, supplemented by his complete mastery of policy and business detail and his exceptional administrative and executive abilities, made such service incalculably valuable. Always devoted to the principles of the Democratic party as the foundation upon which he believed the highest development of a free government and true civilization must rest, he was called to the cabinet of President Cleveland in 1885, first as Postmaster General and later as Secretary of the Interior. Nurtured upon the maxim of his father, "Perversion of public office to private ends is moral treason," he was signally qualified to aid his chief to make into a living, guiding principle the truism, "Public office is a public trust." I may not here enlarge upon the public services rendered during this period further than to say that to no man more than to Mr. VILAS was President Cleveland indebted for loyal, sagacious counsel and aid in framing or enforcing the policy of his administration, and that the conduct of the two great executive departments of the national government under Mr. VILAS was well-nigh without parallel for comprehensive and broad-minded efficiency. In 1891 came a unanimous call to represent his state in the Senate of the United States, where his brilliant services in the cause of good government, justice, and liberty placed him high upon the roll of American statesmen and patriots. The turn of the political wheel returned him to private life, and a few years of active devotion to general business enabled his exceptional energy and sagacity to win for him a noble fortune, which we now know was sought from no sordid or selfish motive, but for a high and benevolent purpose. This period witnessed some seven years of renewed service as Regent of the University. The last years of his life saw him a member of the commission for construction of our new capitol, the duties of which position he made to almost engross his time and energies; and his administrative ability, business grasp, and impeccable integrity have marked Wisconsin's experience in capitol building as almost unique. His death alone terminated his labors upon this task.

He leaves a striking list of material monuments to his public service. The beautiful Congressional Library at Washington, commenced and largely constructed under his management; many of the finest of the University buildings; the Historical Society's library building; the charming park in Madison, donated in memory of his deceased son; the memorial to his Wisconsin comrades in the historic siege of Vicksburg; and finally our state capitol, already looming impressively in the landscape he loved so well, are among them.

This career, so filled with labor and achievement in public service, was crowned by the munificent gift of all its material fruits to the state he loved so well and in which he gloried, to be used in the education and elevation of her individuals, in which must ever ulti-

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mately rest the safety and welfare of body politic and all free government and true civilization.

This memorial must close,—all too long for the place and occasion, all too short for the subject; but not without at least one word to express the affectionate regard and admiration of those who were favored with intimate view of his personal character and high ideals in association with him in his plans and labors for public good. To them his memory will be of sweet savor amid their grief and bereavement over the all untimely end.

His life, full and eventful, was wonderfully rounded in achievement. Distinguished as a soldier, a lawyer, law-maker and statesmen, business man and financier, he may at the end be writ down "as one who loved his fellow man."

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CASES DETERMINED

AT THE

August Term, 1908.

HANRAHAN and another, Appellants, vs. CITY OF JANESVILLE, Respondent.

October 22—November 10, 1908.

Municipal corporations: Claims: Ambiguity: Appeal from action of common council: Statutes: Construction: Jurisdictional defects.

1. A claim filed against a city entitled "City of J. to H. and L., attorneys for B.," is ambiguous as to the ownership of the demand.
2. While, under statutes providing for the manner in which appeals may be taken from inferior bodies or tribunals to the circuit court, failure to comply in every substantial particular with the statutory requirements pertaining thereto is usually held fatal to the jurisdiction of the appellate court over the subject matter of the action, it is not promotive of the ends of justice to unduly extend the application of such rule beyond questions fairly akin to those presented by the cases passed upon.
3. No great formality is required in reference to the form in which claims are to be presented against a municipality.
4. A mere ambiguity as to the ownership of a claim filed against a municipality is not a defect affecting the jurisdiction of the circuit court on appeal, where the appeal is taken by the true owner from a disallowance made on the merits of the claim.
5. A claim filed against the defendant city, entitled "City of J. to H. and L., attorneys for B.," was disallowed on the merits by the common council. H. and L., who asserted ownership of the claim and that it was filed as their claim, appealed from the ac-

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tion of the common council. On a motion to dismiss the appeal H. and L. offered oral testimony tending to show that they were in fact the owners of the claim filed, which proof was rejected as immaterial and the appeal dismissed. *Held*, that such proof should have been received, and, in the event that H. and L. were able to establish ownership when the appeal was taken, they should have been permitted to prosecute the same.

APPEAL from an order of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This is an appeal from an order dismissing an appeal prosecuted by the plaintiffs from the disallowance of a claim by the common council of the city of *Janesville.* On November 27, 1905, a claim was filed with the city clerk of said city, entitled as follows: "City of *Janesville* to *Hanrahan* and *Lindquist,* Attorneys for M. J. Benson." The amount claimed was $13,950.40. The claim was founded upon extra work alleged to have been performed in connection with the construction of sewers in the city of *Janesville.* The city council allowed $121.20 on account of items contained in the bill and disallowed the balance. Before final action was taken upon the bill as filed it was referred to the committee on sewerage, which committee made a report thereon, in which report the claim was referred to as that of "M. J. Benson and *Hanrahan* and *Lindquist.*" This report was adopted by the common council. The appeal from the disallowance was taken by *R. T. Hanrahan* and *A. H. Lindquist.* After the appeal was taken, on motion of the defendant an order was made by the circuit court requiring formal pleadings to be filed, which order was complied with. Thereafter the defendant moved to dismiss the appeal because the same was not taken by M. J. Benson, the party who it was alleged filed the claim. The circuit court held that the claim filed was uncertain and indefinite as to who in fact owned it, and that it did not appear, in any event, to be that of the plaintiff, and therefore the court failed to acquire any jurisdiction of the appeal, whereupon the order of dismissal

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complained of was entered. It appears from the complaint in the action, and certain offers of documentary evidence made on the motion to dismiss, that the original sewer contract was let to M. J. Benson on August 9, 1904. When the work was but partially completed and on March 20, 1905, Benson assigned all his rights under the contract to *Hanrahan* and *Lindquist*, and they in turn assumed all of Benson's obligations thereunder. This assignment was approved by the street assessment committee of the city of *Janesville* on March 20, 1905, but not in such a manner as to relieve Benson from responsibility in the event of his assignees failing to perform the conditions of his contract. On the same date a power of attorney given by Benson to *Hanrahan* and *Lindquist* was filed with the city clerk of the city of *Janesville*. The instrument empowered the plaintiffs to collect and receive from the city all sums due or to become due under the Benson contract. The plaintiffs offered oral testimony on the motion to dismiss tending to show that they were in fact the owners of the claim filed, which proof was rejected as immaterial. The error assigned is that the court was wrong in granting the motion to dismiss.

For the appellants there was a brief by *Jeffris, Mouat, Smith & Avery*, and oral argument by *M. O. Mouat*.

H. L. Maxfield, city attorney, and *William G. Wheeler*, of counsel, for the respondent.

Barnes, J. The circuit court was entirely justified in holding that the claim in question was ambiguous as to ownership. If *Hanrahan* and *Lindquist* were filing it as their claim, then it is not apparent why they styled themselves "attorneys for M. J. Benson." If they filed it as the claim of Benson, then the query arises: Why was it not drawn in some manner indicating with reasonable certainty that Benson was the claimant, and that the Hanrahan & Lindquist Company filed it as his attorneys in fact? In view of the

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record made and that attempted to be made, the most probable conjecture is that when plaintiffs filed the claim in question they were harboring the belief that they could only assert their claim against the city as assignees of Benson by virtue of the power of attorney referred to in the statement of facts. That the plaintiffs in fact owned the claim, and intended to file it in their own behalf, seems apparent from the record presented and from the rejected offers of evidence.

This court has adopted a strict construction of statutes providing for the manner in which appeals may be taken from inferior bodies or tribunals to the circuit court. Failure to comply in every substantial particular with the statutory requirements pertaining to such appeals has usually been held fatal to the jurisdiction of the appellate court over the subject matter of the action. *Oshkosh W. W. Co. v. Oshkosh,* 106 Wis. 83, 81 N. W. 1040; *S. C.* 109 Wis. 208, 85 N. W. 376; *Telford v. Ashland,* 100 Wis. 238, 75 N. W. 1006; *Drinkwine v. Eau Claire,* 83 Wis. 428, 53 N. W. 673; *Bullard v. Kuhl,* 54 Wis. 544, 11 N. W. 801. While these cases express the settled law of the state upon questions fairly akin to those passed upon, it would not be promotive of the ends of justice to unduly extend their application. In this case there was no doubt about the nature of the transactions out of which the claim arose. There does not seem to have been any doubt upon the part of the city that plaintiffs were at least interested therein. They had performed a large part of the Benson contract, and it is a fair assumption that it was known to the city officials that they performed such work as assignees of Benson, and that they were entitled to whatever might be owing on the claim filed, if anything was in fact owing thereon. There is no question of the city having any offset or counterclaim against Benson that might not be pleadable against his assignees. There is no suggestion that on a trial of the case the city cannot be amply protected against any claim Benson might here-

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after make on the same grounds before any judgment would be awarded plaintiffs. The record does not present any difficulties in the way of administering justice if the appeal is held good. The order of dismissal is based upon grounds that do not affect the merits of the claim presented, but if the court, for any reason, failed to get jurisdiction, the ruling of the trial judge must be upheld. No great amount of formality is required in reference to the form in which claims are presented to a municipal corporation. *French v. Dunn Co.* 58 Wis. 402, 17 N. W. 1. In *Marsh v. St. Croix Co.* 42 Wis. 355, and in *Eaton v. Manitowoc Co.* 40 Wis. 668, it was held that claims might in certain cases be amended after they were filed, particularly where they were not sufficiently itemized. This doctrine seems to be adhered to in *Miller v. Crawford Co.* 106 Wis. 210, 82 N. W. 175, and also in *Outagamie Co. v. Greenville,* 77 Wis. 165, 171, 45 N. W. 1090. In *Marsh v. St. Croix Co.* the claim filed was disallowed in part because it was not properly itemized and also because the party filing the same did not furnish any sufficient proof of ownership. After the time for taking an appeal from such disallowance had expired, the plaintiff filed an amended claim obviating the objections upon which the county board based its action. This court held that the amended bill was properly filed and should have been acted upon by the board. In this case the court also held that the filing of the claim was the commencement of an action, although sec. 4242, Stats. (1898), had not then been enacted. The decision in this latter particular is somewhat limited by *Rice v. Ashland Co.* 108 Wis. 191, 84 N. W. 189. The appeal here was taken under sec. 925—60, Stats. (1898), which provides that in the event of a disallowance of a claim, in whole or in part, "the claimant may appeal from the decision disallowing said claim to the circuit court of the county in which such city or some part thereof is situated by causing a written notice of appeal to be served on the clerk of such city within

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twenty days after the disallowance of such claim, and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties to be approved by the city clerk, conditioned for the faithful prosecution of such appeal and payment of all costs that shall be adjudged against the appellant." No objection is made to the form of the notice of appeal or bond given on the appeal in this case. The defendant contended, and the circuit court held, that the "claimant" did not take the appeal. The appellants assert the contrary. They offered to remove the ambiguity as to ownership appearing upon the face of the claim by proof which was rejected. If the plaintiffs are in fact the "claimants," then there is at least a literal compliance with the language of the statute, because the appeal has been taken by the parties designated by the statute as the proper parties to take the same. By the ruling of the circuit court the plaintiffs were precluded from showing, if they might, that they were in fact copartners and that the bill was filed in the firm name which they had adopted. They were also precluded from showing that after the filing of the bill and before the appeal was taken they acquired the interest of the real owner or owners therein.

We do not think that a mere ambiguity as to the ownership of a claim as filed is a defect therein that is jurisdictional, where an appeal is taken by the real owner from a disallowance made on the merits of the claim. The city council might very properly refuse to act upon the claim until it was made definite and certain, or it might disallow the claim because it was indefinite or uncertain as to ownership. Such action would enable the owner to amend his claim. But where, as here, the city council acted upon the claim filed, and the appeal was taken by the parties who assert ownership to the claim, and further assert that they filed it as their claim, and where the city is not precluded from interposing any legitimate defense it may have, we conclude that plaint-

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iffs should be permitted to show, if they can, that they are in fact the sole owners of the claim and that they filed the same as their claim in the first instance, or that they were the legal assignees of the claimant when the appeal was taken, and, in the event of their being able to establish ownership when the appeal was taken, they should be permitted to prosecute the same.

By the Court.—The order appealed from is reversed, and the cause is remanded for further proceedings according to law.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant, vs. CITY OF JANESVILLE, imp., Respondent.
SAME, Respondent, vs. SAME, Appellant.

October 23—November 10, 1908.

Railroads: Property: Taxation: Special assessments: Public-service corporations: Special improvements: Assessment by front-foot rule: Constitutional law: Police power.

1. The principle that the franchises of a public-service corporation, together with the property owned by it which is necessary for its use in order to accomplish the purposes of its existence, constitute an entirety which is not ordinarily subject to division by sale of a part on court or tax process, applies to railroads, but is subject to the exception that such sale and division may be authorized by special legislative authority.
2. Ordinary statutory provisions, merely general in their nature, will not be construed to apply to such property.
3. Ch. 425, Laws of 1903, providing, among other things, that the property of railroad corporations shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals, such assessments to be collected by an ordinary action at law, is an express and unambiguous declaration of legislative purpose to subject the property of a railroad to special assessments, although such property is a part of the entirety.
4. Secs. 925—216 to 925—218, Stats. (1898), providing for the assessment for special improvements against adjoining lots at an

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even rate not exceeding $2 nor less than twenty-five cents per linear foot on the whole frontage of each lot, apply to public sanitary sewers, and are constitutional as a legitimate exercise of police power.

5. Assessments against adjoining property need not be limited to benefits received where such assessments are properly made under the police power.

APPEALS from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of defendant.*

For the plaintiff there was a brief by *Jackson & Jackson,* attorneys, and *C. H. Van Alstine,* of counsel, and briefs in reply by *C. H. Van Alstine,* of counsel; and the cause was argued orally by *A. A. Jackson* and *C. H. Van Alstine.*

H. L. Maxfield, city attorney, for the defendant.

WINSLOW, C. J. The city of *Janesville,* having adopted those provisions of the general city charter law relating to the building of sewers (secs. 925—208 to 925—239, Stats. 1898), proceeded to construct sanitary sewers in certain streets of the city and levy assessments against adjoining real estate at the uniform rate of forty cents per linear foot to pay a part of the expense. The railroad company owns and operates a railroad running through the city upon a right of way 100 feet in width, and also owns several tracts of land adjoining said right of way and fronting on certain of the streets in which sewers were laid. Upon one of these tracts is a freight depot and upon others are warehouses and other buildings rented by the company to private parties, which are reached by short spur tracks branching off from the main line. The city levied sewer assessments at the uniform rate aforesaid against all of these parcels which fronted on the line of the sewers outside of the 100-foot right of way. The company paid the assessments so made against those parts of such parcels upon which the warehouses were located, but declined to pay the assessments against the freight

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depot property and the strips seventeen feet wide upon which the spur tracks were located, and brought this action in equity to set aside the last-named assessments on the ground that such property was not subject to assessment. After trial the court sustained the assessments against the freight depot property and against all but two of the strips on which the spur tracks are situated, but set aside the assessments as to the last-named strips because they were found not to be actually benefited, and each party appealed from that part of the judgment adverse to its contention.

The leading contention made by the plaintiff is that the lands on which its freight depot and spur tracks are situated are not subject to assessment for local improvements, because they are a part of an entirety composed of the whole property, real and personal, of a public-service corporation, and hence are not severable. The general doctrine that the franchises of such a corporation, together with the property owned by it which is necessary for its use in order to accomplish the purposes of its existence, constitute an entirety which is not ordinarily subject to division by sale of a part on court or tax process, is firmly established in this court. *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80, 70 N. W. 77, and cases cited. This principle, however, is subject to the exception that such sale and division may be authorized by special legislative authority. Ordinary statutory provisions, merely general in their nature, will not be construed as intended to apply to such property, but the legislature has full power over the subject, and may by specific provisions accomplish the result. The general principle is well illustrated in the case of *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506, 62 N. W. 417, where the city had attempted to assess a strip of the right of way of the company for the paving of an adjoining street. It was contended in that case that the provisions of subd. 14, sec. 1038, R. S. 1878 (being the same as subd. 14, sec. 1038, Stats. 1898), exempting railway prop-

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erty from general taxation, "except that the same shall be subject to special assessments for local improvements in cities and villages," made the right of way subject to assessment under the general provisions of the city charter authorizing assessments against adjoining real estate. It was held, however, that the exception in the exemption statute was not an affirmative declaration making railroad property subject to special assessment, but simply confined the exemption to the subject of general taxation, and that the general provisions of the city charter providing for special assessments did not show a legislative intention that a portion of a railroad right of way should be so assessed and severed by sale for nonpayment of the assessment. In the discussion of the question it was said that the principle is established that "such a result cannot be effected under the power of taxation *without express legislative authority,* and that general language in such statutes will not be held to authorize such a result." Since the decision of that case, however, the legislature has in no uncertain terms made express provision for the levying of such assessments against such property. Ch. 425, Laws of 1903, provides, among other things, that the property of railroad corporations "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals." This is an express and unambiguous declaration by the legislature upon a subject over which it has full power, which closes the question. It is instructive, also, to note that by the same law it is provided that such assessments may be collected by ordinary action at law, thus obviating all practical danger of a sale and consequent severance of a part of the corporate property. It must therefore be held that all of the property assessed in the present case was subject to assessment, although it was a part of the entirety.

The second contention of the railroad company is that the assessments are invalid because made for arbitrary sums by

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the front-foot rule and not in proportion to benefits actually received. The sections of the general charter law under which they were made (secs. 925—216 to 925—218, Stats. 1898) provide for the making of assessments against adjoining lots at an even rate not exceeding $2 nor less than twenty-five cents per linear foot on the whole frontage of each lot. There are no provisions for the ascertainment of actual benefits nor for the limitation of the assessments to the amount of actual benefits received. So the contention becomes primarily a contention against the validity of the law, and, if the law be valid, the assessments themselves are valid because they were made in accordance with the terms of the law. This court has held that, where assessments for local improvement are required to be made according to the benefits accruing to each parcel, an assessment of a level rate by the front-foot rule, while not necessarily void, will be held invalid, unless it appears that the assessing board has considered the matter and determined that the benefits are in fact proportionate to the frontage of each parcel. *Hayes v. Douglas Co.* 92 Wis. 429, 65 N. W. 482; *Hennessy v. Douglas Co.* 99 Wis. 129, 74 N. W. 983; *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. These cases, however, have no bearing on the question before us, because the statute before us does not require the assessment to be in proportion to benefits received. The simple question here is whether a law is constitutional which provides for the assessment of a fixed proportion of the cost of a public sanitary sewer against adjoining lots by the front-foot rule.

The decisions upon the general question of the validity of special assessment laws which do not provide for assessments to be made in proportion to the benefits received are very numerous and conflicting. A treatise might easily be written upon the subject, but no attempt will be made to write such a treatise here, as the writer fears that such attempt might result in a collection of words without knowledge which

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merely darken counsel. It is well settled that assessments against adjoining property are not limited to benefits received where such assessments are properly made under the police power. Thus the court has held that the entire cost of a sidewalk may be properly assessed against the adjoining lot without reference to or ascertainment of actual benefits. *Hennessy v. Douglas Co.* 99 Wis. 129, 74 N. W. 983; *Lisbon Ave. L. Co. v. Lake,* 134 Wis. 470, 113 N. W. 1099. In the last case it was held that, inasmuch as the presence of a defective and dangerous sidewalk constituted a serious public inconvenience and danger, the city might, under the police power, be clothed with the right to build or repair it at once without notice and to charge the entire expense to the abutting lot upon which it stands, regardless of the question of the amount of benefit actually conferred. A defective sidewalk is a menace to the public safety, and its presence in a public street is quite analogous to the presence of a disease-breeding cesspool upon private property, which under well-established principles may be removed by the public authorities and the expense thereof charged to the property if the statute so authorize. The decisions are quite unanimous upon this question, and may be found collated in 2 Cooley, Taxation (3d ed.) 1128, 1129, 1130. Upon the last-named page Judge Cooley proceeds as follows:

"There seems to be no legal impediment to a requirement under the police power that lotowners in cities and villages shall be at the expense of constructing that portion of the public sewer in front of their respective premises,"—citing *Van Wagoner v. Paterson,* 67 N. J. Law, 455, 51 Atl. 922. See, also, *Gleason v. Waukesha Co.* 103 Wis. 225, 79 N. W. 249.

There certainly is no fault in this line of reasoning. The preservation of public health from danger resulting from the accumulation of sewage upon private property in cities is fully as persuasive a justification for the exercise of the police power as the preservation of life and limb from the dangers resulting from defective or snow-covered sidewalks. So far

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as this court has spoken on the subject it has sustained the right to make sewerage assessments upon the front-foot rule without regard to the extent of benefits. *Meggett v. Eau Claire,* 81 Wis. 326, 51 N. W. 566. See, also, *Blount v. Janesville,* 31 Wis. 648. The provisions of the general charter in question evidently contemplate that all the property drained by the system shall be assessed at an even rate, so that each parcel shall pay approximately its proportionate share of the cost of what may be called merely a service sewer, while the additional expense of main or trunk sewers, made necessary in order to conduct away the combined output of the minor service sewers, shall be borne by the entire district. If this be, as we hold it is, a legitimate exercise of the police power, there are no constitutional objections, either national or state, which stand in the way. See *French v. Barber A. P. Co.* 181 U. S. 324, 21 Sup. Ct. 625.

It follows from these considerations that the assessments in question should all have been sustained.

By the Court.—Those parts of the judgment from which the plaintiff appeals are affirmed, and those parts from which the city appeals are reversed, with directions to enter judgment in accordance with this opinion, the city to recover one bill of costs in this court.

LYNCH, Appellant, vs. RYAN and others, Respondents.
LYNCH, Respondent, vs. RYAN, imp., Appellant.

October 23—November 10, 1908.

Mortgages: Expenditures by mortgagee in possession: Taxes: Repairs: Permanent improvements: Reimbursement: Redemption: Basis of reimbursement: Evidence: Accounting: Interest: Insurance: Services: Costs.

1. The general rule is that a mortgagee in possession is entitled to reimbursement by the owner of the right of redemption for his reasonable expenditures to preserve the property, such as taxes,

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repairs, and the like, but not outlays for permanent improvements.

2. If a mortgagee in possession makes permanent improvements of the property with the approval of the mortgagor, or which are necessary to the proper and profitable use of the property and without objection by the mortgagor, he is entitled to be equitably reimbursed therefor by the latter as a condition of his exercising the right of redemption.
3. Where a mortgagee should be reimbursed as aforesaid the proper basis of compensation is the reasonable cost.
4. Evidence showing that repairs or improvements of mortgaged property were made as a judicious owner would make the same in caring for his own property is sufficient, *prima facie*, to show that the charges therefor are reasonable.
5. In an accounting between a mortgagee in possession and the mortgagor there should be no rest resulting in compounding interest. It is proper to close the account at the end of each year; striking a balance between debit and credit items, excluding the original debt and interest thereon, any balance in favor of the mortgagee after discharging the interest to be added to the principal and any balance in favor of the mortgagor going in reduction thereof.
6. If a mortgagee in possession is not allowed expenditures in making permanent improvements of the property which increase its value and is charged with the rental value of the property as improved, he should be given credit with interest on the reasonable cost of the improvements, unless such cost exceeds the enhanced value of the property, in which case he should be credited with interest on such enhanced value.
7. If a mortgagee in possession incurs expenses for insuring buildings thereon against loss by fire, he should be allowed credit therefor.
8. A mortgagee in possession is not entitled to credit for services in supervising the property.
9. In an accounting between mortgagor and mortgagee where there is an annual closing, interest on the items down to the time thereof should not be charged or credited.
10. As a general rule, in an action by a mortgagor against the mortgagee in possession to establish his right of redemption and for an accounting, the defendant should recover costs notwithstanding plaintiff prevails.
11. In such an action as above mentioned if the defendant is at fault, rendering expensive litigation necessary to establish plaintiff's right to redeem, the plaintiff may, in the discretion of the court, be allowed costs.

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12. Generally in a suit for redemption of mortgaged property and for an accounting if the circumstances are exceptional, warranting the imposition of costs upon the defendant, recovery should be contingent upon plaintiff exercising his right of redemption, but under exceptional circumstances whereby the plaintiff by defendant's wrong is put to very burdensome expenses to establish his right, the recovery of costs may properly be made absolute.

[Syllabus by MARSHALL, J.]

APPEALS from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed on both appeals.*

Equitable action to have a deed, under which defendant *Ryan* had claimed and been possessed of a farm property for several years, declared to have conveyed to him only a mortgage interest and plaintiff adjudged to be entitled to redeem from the incumbrance as owner of the legal title, and to compel said defendant to account as mortgagee in possession under the rules applicable to the situation, to the end that the amount might be ascertained which he was equitably entitled to receive from plaintiff to extinguish the mortgage lien and said defendant's other legitimate claims against the property.

Such proceedings were duly had in the action that defendant *Ryan* obtained judgment dismissing the complaint with costs, which was reversed on appeal to this court, plaintiff being sustained as to the relations of the parties to the property, and the cause being remanded for the accounting and other necessary proceedings to settle the rights of the parties. The case on the first appeal is reported in 132 Wis. 271, 111 N. W. 707, 112 N. W. 427. An accounting was had pursuant to the decision aforesaid. The general result was as follows: During the time defendant *Ryan* occupied the property he knew his only interest therein was that of a mortgagee. His possession commenced about March 1, 1899, and continued down to the accounting, during which time he enjoyed the rents and profits of the property, and expended

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money for taxes levied thereon, interest upon prior incumbrances, repairs and improvements of the property, and performed labor in that regard as indicated in the account. All repairs and improvements, except enlarging the barn, were made with the knowledge and approval of plaintiff and were necessary to the profitable management of the property. Two hundred and ninety-seven dollars was expended in enlarging and improving the barn, $175 of which was for the enlargement. The annual rental value of the land was $400 per year. Defendant *Ryan* is entitled to credit for expenditures for improvements made with plaintiff's consent, for all necessary repairs, including his own labor in that regard, for interest on the original debt to him and for interest and taxes paid, and he is chargeable with the rental value of the farm. He is not entitled to credit for personal care and supervision of the property. The account should be stated by striking a balance March 1, 1900, between the credits *Ryan* was entitled to, interest upon the original debt and the rental value of the property, and in like manner a balance for each year thereafter down to the time of closing the account March 1, 1908, and then crediting him with his principal claim, and with the balance found in his favor and interest on each from the date thereof to that of closing the account, and charging him with the balance in plaintiff's favor with interest from the date thereof to that of closing the account. The result of such accounting is that *Ryan* March 1, 1908, was in credit $1,612.94, as shown in the itemized statement.

The court, not being able to determine definitely from the evidence what items were for repairs and what were for improvements, deducted from his credits for the first period, which included the expenditures for enlarging the barn, the $175 found to be the extra expenditure for the enlargement.

Plaintiff was held entitled to costs up to the time of the accounting, the amount thereof to be deducted from that found due defendant, in case of the right of redemption being exercised within the time allowed, otherwise that pay-

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ment be enforced by execution. Neither party held entitled to costs of the trial as to the accounting.

In accordance with the foregoing judgment was ordered and rendered in plaintiff's favor, he being allowed one year from and after March 1, 1908, to redeem the property by paying the amount due *Ryan* in accordance with the findings, with interest, and in case of an appeal two months after filing of the *remittitur,* and in case of the right of redemption not being exercised within such time plaintiff was foreclosed of all interest in the property.

Numerous exceptions to the findings were filed by both parties and each appeals from the judgment.

For the plaintiff the cause was submitted on the briefs of *Ruger & Ruger.*

For the defendant there were briefs by *M. G. Jeffris* and *Edward H. Ryan,* attorneys, and *M. O. Mouat,* of counsel, and oral argument by *Mr. Ryan* and *Mr. Mouat.*

MARSHALL, J. The greater part of the briefs of counsel on both appeals is taken up in discussing the findings that all the repairs and improvements of the mortgaged property charged for by defendant in his account, except the enlargement of the barn, were made by him with the knowledge and approval of the plaintiff and were necessary to the profitable management of the farm; that such enlargement required an expenditure of $175 out of a total of $297 paid for repairing and rebuilding the barn; that defendant knew from the beginning of his possession his sole interest in the property was by virtue of a second mortgage he owned thereon; and that the rental value of the property during such possession was $400 per year. Notwithstanding very positive claims made upon the one side or the other that some or all of these findings are unsupported by evidence, as we read the record, there is credible evidence as to each matter and no clear preponderance of evidence against the conclusion arrived at by the trial court in regard to either of them. It is

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considered better to rest this branch of the case with this statement of the court's opinion than to go at length into a discussion of the evidence.

In view of the fact as indicated, supported as we think it is by the decision upon the former appeal and the undisputed oral and written evidence, that defendant incurred the expenses charged in his account with knowledge of his interest in the property and with the approval and consent of plaintiff, with the exception mentioned, we may pass as immaterial the complaint that evidence was permitted on the part of the defendant that he believed, prior to the judicial determination to the contrary, that he was the true owner of the property and the argument made on the subject of whether he acted in good faith as such owner in making the expenditure, and that a mortgagee in possession is not entitled to reimbursement for permanent improvements of the property as a condition of the mortgagor being permitted to redeem.

While it is true, generally speaking, that a mortgagee in possession is only entitled to be reimbursed by the holder of the right of redemption for his reasonable expenditures for preserving the property, such as taxes, repairs, and the like, not including permanent improvements, he is entitled in addition to be compensated for his reasonable outlays in making such improvements as such holder approves and consents to. That exception to the general rule is as well established in the law as the rule itself and is just as well grounded in principles of equity upon which such rule depends. 2 Jones, Mortgages (6th ed.) §§ 1127, 1128; 2 Pingrey, Real Prop. § 970; 27 Cyc. 1266, and cases cited. *Gleiser v. McGregor,* 85 Iowa, 489, 52 N. W. 366, is a good type of the adjudications on this subject. The instrument creating the mortgage interest was in the form of an absolute deed and the circumstances were quite similar to those in hand. In disposing of the matter as to the improvements the court said:

"Having virtually consented to the improvements, there is no reason why the plaintiff should not be held to account

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for what they cost, in the absence of evidence showing that the cost was so great as to indicate that the defendant intended thereby to prevent any redemption."

To the same effect are *Harrill v. Stapleton,* 55 Ark. 1, 16 S. W. 474, and many other cases that might be referred to. *Merriam v. Goss,* 139 Mass. 77, 28 N. E. 449, is to the effect that a mortgagor is liable to reimburse his mortgagee in possession for the latter's expenditures for reasonable improvements when, having knowledge of their being made and intending to redeem, he makes no objection. That is particularly in point in a case like the one before us, characterized as it is by circumstances well calculated to produce serious doubt, at least, in the mind of the mortgagee as to whether the right of redemption will ever be exercised.

There is another exception to the general rule as to allowing a mortgagee in possession compensation for improvements, which is applicable here by reason of the finding that the improvements in question were reasonably necessary for the profitable management of the farm. That exception is this: Where possession by the mortgagee is under agreement and the improvements are necessary to the "judicious and proper management of the property" (*Rowell v. Jewett,* 73 Me. 365), or as stated in *Wells v. Van Dyke,* 109 Pa. St. 330, where they "were necessary and beneficial for the proper use of the property." That exception, manifestly, does not apply where there is not at least consent by not objecting; not under any circumstances where there is a protest against the expenditure.

There is no difficulty with the trial court's disposition of the case because of there not being any finding as regards the extent to which the improvements were beneficial to plaintiff. That, ordinarily, is the equitable limit of recovery, but not so where the making of the improvements was authorized or consented to. In that case the legitimate basis is the reasonable cost, the same as in case of repairs. *Merriam v. Goss, supra.*

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Neither is there any serious difficulty because of absence of any finding that the expenditures for that which was done were reasonable. The parties proceeded from first to last in the accounting upon the theory that if it were proper to make the repairs and improvements at the expense of the mortgagor, the expenditures to that end were reasonable. Moreover, the evidence pretty clearly shows, without controversy, that defendant proceeded in the matter as a judicious owner would in caring for his own property, which is sufficient of itself to show that the charges for repairs and betterments were reasonable, in the absence of any evidence to the contrary.

What has been said brings us to the accounting. The court was not able from the evidence to distinguish definitely between defendant's expenditures for repairs and those for improvements, but that is not very serious, since, in view of the consent and approval found, all are on the same basis, except the outlay for enlarging the barn. True, since the court found the enlargement was not consented to and, as we understand it, was not really necessary for the beneficial use of the farm, it was necessary to eliminate from the account all matters in that regard. That was not done by specification of particular items, but was as to the aggregate with substantial justice between the parties in our judgment.

The account was stated by crediting defendant with interest on his mortgage indebtedness and his disbursements down to March 1, 1900, the most convenient time in the judgment of the trial court for a first settlement after the possession commenced, and crediting him expenditures for interest paid on the first mortgage, taxes levied upon the property, and repairs and improvements, and charging him for the rental value of the farm to that date, and the $175 included in the items of credit covering the cost of enlarging the barn, and striking a balance, and proceeding in like manner for each year down to the final settlement March 1, 1908, making

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eight yearly statements in all. Then accumulating the several balances and interest on each from the date thereof down to such final date and the original indebtedness into a final statement of debits and credits and striking a balance. In this way the amount found due the defendant at such final date was $1,612.94. With the exceptions hereafter noted the manner of the accounting is fully sanctioned by *Martin v. Morris,* 62 Wis. 418, 22 N. W. 525, though the better way would have been to have taken an account of the debit and credit items, exclusive of the interest on the original indebtedness, for the first period, and in case of the balance being in favor of the mortgagee, deducted therefrom the interest on the original indebtedness down to such date and added the residue, if any, to the principal, and then computed interest thereon down to the end of the second period and treated the same as before, in case of there being again a balance between the debit and credit items in favor of the mortgagee sufficient to cover the interest, and, if not, carried the deficiency forward to be added to the interest for the third period, and thus proceeded to the end, avoiding compounding interest and reducing the principal indebtedness at the end of any period, in case of there being a balance between the debit and credit items in favor of the mortgagee after deducting interest, and increasing such principal in case of the residue being the other way.

These fundamental rules are to be observed in an accounting of this sort: There should be no rest resulting in a compounding of interest nor any other than such as equity requires. Any balance in favor of the mortgagor between debit and credit items after discharging the interest should be added to the principal, and any balance between such items after discharging the interest in favor of the mortgagee should go in reduction of the indebtedness. In this case the balance was in defendant's favor for each of the first four years and for all except the second thereof such balance was

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for a sum in excess of interest on the indebtedness. The result of crediting defendant, as was done, with interest on those balances which included interest, was to give him the benefit of full compound interest for each of the three years and likewise for the other year as to the difference between the accrued amount and the balance between the credit and debit items as the court made up the account, which balance only should have been applied upon the interest and the residue of interest carried forward as above indicated. The amount of these errors has been carefully determined and make a substantial sum to be charged to defendant in correcting the final balance.

Again, for each of the last four years there was a small balance in favor of the plaintiff. Charging such balance to defendant with interest from the date of each down to the time of closing instead of applying the same in reduction of the indebtedness, resulted in a small error in plaintiff's favor. Again, the court credited the defendant each year with interest upon the interest paid on the outstanding mortgage from the date of the payment down to the closing of the account for that year; to that extent swelling the balance in favor of the defendant at the end of the year upon which interest was computed down to the closing of the account, thus compounding the interest, resulting in a further error to a small amount in defendant's favor for such compounding, and a further error in allowing interest upon the interest item before the close of the current year.

On the other hand, since defendant was charged with the full rental value of the farm as improved by the reconstruction and extension of the barn, he is obviously entitled to interest on the cost for the enlargement from the end of the year in which the same occurred down to the closing of the account. True, it has been held that a mortgagee in possession who is allowed to recover for improvements should not be permitted to have credit for interest thereon, since he has

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the use thereof (*Hadley v. Stewart,* 65 Wis. 481, 27 N. W. 346), but by the same principles of equity where he is charged the full rental value of the property as improved, but not allowed for the improvements, he should be given credit, at least, for interest upon the reasonable cost thereof. So the court here, equitably, should have credited defendant with seven years' interest upon the cost of the barn, exclusive of the repairs.

We note that notwithstanding the learned court decided that all of the improvements made by the defendant were consented to by plaintiff and that they were necessary to the profitable management of the farm, except as to the $175, it disallowed items for fruit trees and setting the same out and for reseeding the orchard, aggregating $17.50. It is the opinion of the court that credit for that amount should have been allowed for the year in which the expenditure was made. We must assume that it was an oversight in not doing so.

There was a charge for $2.50 for insurance on the property, paid in 1902, which was disallowed. It is believed that in the light of modern ideas in respect to the reasonable care of property by one in possession thereof in the nature of trustee for another, having a duty or authority to preserve the same, reasonable expenditures for insurance are as legitimate as such expenditures for repairs and to prevent loss by decay or destruction otherwise.

The aggregate of the corrections in plaintiff's favor and those in defendant's favor in accordance with the foregoing shows that the one substantially balances the other. There is not enough difference in view of the nature of the account to take the matter out of the field of *de minimis non curat lex.*

Some other objections to the account made upon defendant's appeal may well be briefly disposed of. There is one that the defendant should have been allowed credit for the

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reasonable value of his services in making several trips to the farm to look after the same and a sum per year for five years for supervision. That is ruled in favor of plaintiff by the familiar principle that in such an accounting charges for supervision are not allowable. 2 Jones, Mortgages (6th ed.) § 1132. That there are exceptions to that general rule may be true, but there are no special circumstances here sufficient to require any variation of the ordinary method.

There is a further claim to interest on items of expenditure during each of several years down to the following March 1st, upon the assumption, we take it, that there was no income from the property to provide therefor till that time. Obviously, there was no fixed date when the rent became chargeable. It was accruing day by day as the items of expense became chargeable, and equitably the one so far offset the other that for convenience and as the most practicable method and the usual one for an equitable adjustment, all items of debit and credit for each particular year were brought down to the end thereof without interest, for a determination of the condition of things between the parties at that time.

It is urged upon defendant's appeal that the general rule in an action of this sort is that defendant is entitled to costs notwithstanding plaintiff recovers. Such we recognize as being the general chancery practice (17 Ency. Pl. & Pr. 975, and cases cited), but as is usual there are important exceptions. One of them exactly fits this case, viz.: When defendant is clearly at fault in the litigation to the plaintiff's prejudice by denying his right of redemption and compelling him to establish it by protracted and expensive litigation, he has no equitable right to costs or to be relieved from paying costs. *Wells v. Van Dyke,* 109 Pa. St. 330; *Still v. Buzzell,* 60 Vt. 478, 12 Atl. 209; *Hills v. Loomis,* 42 Vt. 562; *Ryer v. Morrison,* 21 R. I. 127, 42 Atl. 509; *Barton v. May,* 3 Sandf. Ch. 450; *Turner v. Johnson,* 95 Mo. 431, 454, 7 S. W. 570;

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2 Jones, Mortgages (6th ed.) § 1111, and cases cited. The rule deducible from these authorities and many others that might be referred to is this: While, generally speaking, in case of a suit for a redemption of mortgaged premises, even though plaintiff recovers, the defendant should be allowed costs, in case of an unwarranted defense, especially of a denial of the right of redemption *in toto,* causing delay and expense in establishing such right, the defendant may not only be denied costs but be adjudged to pay costs to his adversary. That principle, which was well grounded in chancery, is fully preserved in our statutory system, since it provides that the costs in equity cases may be allowed or disallowed in the discretion of the court. The court's discretion was wisely exercised as to the main issue and was at least permissibly exercised in not allowing costs to either party on the trial as to the accounting, since there were many claims on each side as to matters of fact as well as of law which could not receive approval. 2 Jones, Mortgages (6th ed.) § 1112.

Serious complaint is made because the award of costs to the plaintiff was absolute. It may well be that, ordinarily, where in a case of this sort costs are adjudged to the plaintiff they should be contingent upon the right of redemption being actually exercised, but it is considered that such rule is not without its exceptions, though it may be said there should be some rather extraordinary circumstances to justify making the mortgagee pay costs regardless of the right of redemption being exercised. However, where, as in the instance before us, the right of redemption is denied and the burden of establishing it is very great; the contest in regard to the matter and the final accounting requiring several trials in several courts, covering a period of several years, attended with expenses so great that the magnitude of the burden may well render the right of redemption when fully established and made exercisable of little value, or, at least, its value under the circumstances very much impaired,—it is not an abuse

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of judicial discretion to, so far as practicable, remedy the wrong done to the plaintiff by enforcing payment to him at all events, in the ordinary way, of costs of the trial on the main issue.

There are some other trifling matters which, as we view them, cannot in any event affect the result and do not involve any important principle of law, and, therefore, we will pass them with this brief notice. The general result of the foregoing is that the judgment as rendered does substantial justice between the parties.

By the Court.—The judgment is affirmed upon both appeals. Neither party will be taxed with costs in this court in favor of the other, and each will pay one half of the clerk's costs.

WHEELER, Appellant, vs. MILNER, Respondent.

October 23—November 10, 1908.

Appeal and error: Assignment of error: Negligence: Personal injuries: Damages: Evidence: Physical conditions preceding injury: Trial: Misleading instructions: Proximate cause: Harmless error.

1. Where an examination of the evidence shows that a verdict is not without support therefrom, an assignment of error for denying a motion to set aside the verdict and grant a new trial cannot be sustained.
2. In an action for negligent injury it is not error to admit testimony that plaintiff suffered an injury some years before, and experienced persistently thereafter symptoms similar to those of which he complained after the alleged injury to him by the defendant, since such testimony tends more or less directly to show that the physical condition under which he suffered might have been due to something other than defendant's negligence.
3. In an action for negligent injury alleged to have been caused by defendant's attempt to drive his team past that of plaintiff, an instruction, "But even if the head driver should unreasonably refuse or fail to make room, those approaching from the rear may not, for that reason, wilfully and wantonly force their way

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past him, if by so doing they produce him injury," though stating an abstractly correct rule of law, is *held* to have been inapplicable to the situation on trial, but, in view of the rest of the charge, not to have materially misled the jury.

4. An instruction to the jury stating that the proximate cause of an injury is its *direct* and natural cause is erroneous, but in this case is *held* not prejudicial, there being no evidence of an intervening event through which the negligence charged might or needed to be connected with the result, and the instruction having embodied also the necessity of the existence of reasonable anticipation.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action for negligence, wherein, plaintiff having stopped his loaded team in the road, and being engaged immediately in front of his front wheel in relieving an entanglement of harness, the defendant undertook to drive by him from the rear upon the right-hand side, and, as plaintiff claims, turned back into the road before he had completely passed the plaintiff, causing the harness, and especially the whiffletree on defendant's vehicle, to strike the plaintiff and do him serious injury. The action was tried to a jury and a general verdict found for the defendant, upon which judgment was entered, from which the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Jeffris, Mouat, Smith & Avery,* and for the respondent on that of *Thos. S. Nolan.*

DODGE, J. 1. An examination of the evidence convinces us that the verdict is not without support therefrom, and therefore the assignment of error for denying plaintiff's motion to set aside the verdict and grant a new trial cannot be sustained.

2. Testimony of certain witnesses that plaintiff suffered an injury some years before, and experienced persistently thereafter symptoms similar to some of those of which he complained after the alleged injury to him by defendant, was admitted over objection. We think in this there was no

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error, for it tended more or less directly to show that the physical condition under which he suffered might have been due to something other than defendant's negligence.

3. Error is assigned upon a clause extracted from the court's instruction in the following words:

"But even if the head driver should unreasonably refuse or fail to make room, those approaching from the rear may not, for that reason, wilfully and wantonly force their way past him, if by so doing they produce him injury."

This is undoubtedly good law. If the defendant might not be negligent, *a fortiori* he had no right to act wilfully and wantonly. But of course the complaint is that these words might have conveyed to the jury the idea that the test of defendant's liability was the wilfulness or wantonness of his act. In the rest of the charge, however, the court clearly told the jury that defendant was bound to exercise the care usually exercised by ordinarily prudent persons under like circumstances, and was guilty of negligence if he failed so to do, and liable for the proximate results thereof to the plaintiff. The giving of an abstractly correct rule of law, though not applicable to the situation upon trial, is not error, though it may be unadvisable and may be ground for reversal if it appears likely that the jury were materially misled thereby. We can see no probability of such result, however, from the clause excepted to, in view of the remainder of the charge given imposing liability for mere negligence.

4. Error is assigned upon the instruction on the subject of proximate cause. The court said:

"The proximate cause of an injury is not only its direct and natural cause, but also such cause as a person of ordinary intelligence and prudence ought reasonably to foresee might produce some injury to another as its direct and natural result under like circumstances."

The vice lies in the word "direct." The proximate cause of an injury need not be the direct cause, for it may be im-

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mediate and indirect. Over and over again this court has so declared. *Wills v. Ashland L., P. & St. R. Co.* 108 Wis. 255, 84 N. W. 998; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809. The proximate cause

"is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediate to the injury or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events, so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result." *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 288, 72 N. W. 735, 738.

It is disappointing, after all that has been said upon the subject, that trial courts cannot avoid so clearly erroneous definitions of this important element in negligence cases. But, however obvious an error may be, reversal of the judgment cannot result if no prejudice is produced thereby. Sec. 2829, Stats. (1898). In this case it is obvious that, if defendant negligently drove his horses and vehicle into contact with the plaintiff, such negligence, if the cause of his injuries at all, was the direct cause. There was no intervening event through which such negligence might or needed to be connected with the result. Hence in this case the jury could not have been misled, by any possibility, by being told that the proximate cause was the direct cause, provided the element of reasonable anticipation also existed, a qualification which, it will be observed, was duly embodied in the instruction above quoted. *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 203, 78 N. W. 446, 778; *Allen v. Voje,* 114 Wis. 1, 17, 89 N. W. 924. It is obvious, therefore, that no improper burden was placed upon the plaintiff's recovery, and no prejudice could have resulted to him from the erroneous definition embodied in this instruction.

No other errors are assigned.

By the Court.—Judgment affirmed.

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JACKMAN, Trustee, Appellant, vs. INMAN, Respondent.

October 23—November 10, 1908

Witnesses: Competency: Transactions with persons since deceased.

In an action on a promissory note by the personal representative of the deceased payee, defendant claimed that another note, produced by defendant, had been given for the note in suit because the prior note was supposed to be lost, and that the second note had been paid. The note produced by defendant was in his handwriting, including the indorsements, except the printed words and the words "Paid in full with int." written across its face, which words defendant testified were not on it when he parted with its possession, and that the note was drawn about November 18, 1901. Defendant was also permitted to testify that the words "Old note lost if found canceled by this note," indorsed on the second note, referred to the note in suit. Defendant also produced a receipt, signed by the deceased, for one year's interest on a note dated November 18, 1901, and testified that it referred to the interest on the note in suit. *Held:*

(1) The witness was incompetent under sec. 4069, Stats. (1898), since he was testifying to a transaction with the deceased concerning which the plaintiff had offered no evidence.

(2) The evidence being within the prohibitions of sec. 4069, Stats. (1898), was erroneously admitted over plaintiff's objection.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

On July 7, 1900, the defendant gave W. T. Van Kirk, now deceased, a note for $200, with interest at the rate of seven per cent., due in one year. This action is brought by the trustee under the will of the deceased on this note, which was found among the decedent's papers. The defense is payment. Defendant claims that in 1901 he gave a new note to take the place of the one upon which this action is brought, which was lost, and that he thereafter fully paid the second note and thereby extinguished the debt. The second note has an indorsement upon its face, claimed by the defend-

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ant to be in the handwriting of the deceased, as follows: "Paid in full with int." Upon its back is the following indorsement, which defendant claims was made by him at the time he gave the note to the deceased: "Int. paid on old note 14.00 Nov. 18 1901 old note lost if found canceled by this note." Defendant introduced in evidence a receipt for a year's interest on a note, and was permitted, over objection, to testify that the receipt referred to the note on which suit had been brought. The action was before this court on a former appeal, and is reported in 134 Wis. 297, 114 N. W. 489. Upon the *remittitur* and a new trial judgment resulted for the defendant. This is an appeal from such judgment.

The cause was submitted for the appellant on the brief of *William G. Wheeler,* and for the respondent on that of *Jeffris, Mouat, Smith & Avery.*

SIEBECKER, J. Upon the trial the defendant produced a note and testified that it was in his handwriting, including the indorsements thereon, except the printed words and the words "Paid in full with int." written across its face, which words he states were not on it when he parted with possession of it. He also states that it was drawn about November 18, 1901. He was also permitted to testify in response to a question as to whether or not he knew what the words "Old note lost if found canceled by this note" referred to, and stated: "*A.* It refers to a lost note. *Q.* To what lost note? *A.* It refers to the note that they are bringing suit on." Defendant also produced a receipt for one year's interest on a note, signed by the deceased and dated November 18, 1901, and testified that it referred to interest on the note sued on. This evidence was duly objected to by appellant as incompetent under sec. 4069, Stats. (1898), for the reason that defendant was testifying to a transaction with the deceased concerning which the plaintiff had offered no evidence. It is

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clear that this evidence pertained to a personal transaction between the defendant and the deceased. The decedent during his lifetime would have been a competent witness to refute defendant's statements he thus makes, to the effect that these indorsements refer to the note in suit and that the receipt covered interest on such note. This evidence being within the prohibition of sec. 4069, Stats. (1898), was erroneously admitted over plaintiff's objection. The obvious purpose and effect of it is to show that defendant paid the note sued on by the giving of his note dated November 18, 1901 (Exhibit 1), and which he now produces and claims to have paid the deceased in his lifetime. This is adverse to plaintiff's claim that the note sued on has not been paid. *Stewart v. Stewart,* 41 Wis. 624; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Jackman v. Inman,* 134 Wis. 297, 114 N. W. 489.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

ESTATE OF MUELLENSCHLADER.

October 23—November 10, 1908.

Wills: Contests over probate: Allowance of counsel fees: Discretion: Review on appeal.

1. Under ch. 397, Laws of 1901, being sec. 4041*a*, Stats. (Supp. 1906)—providing that any court of record, in contests arising therein, upon application for probate of any will, in its discretion, may allow to the proponent of such will a reasonable attorney's fee, to be paid out of the estate of the decedent, and may also in its discretion allow to the contestant if successful in the circuit court a reasonable attorney's fee out of the estate for services in such contest in said circuit court,—the court having jurisdiction of the probate of a will is vested with a discretion in making an allowance to the proponent in will

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contests, and therefore, unless there is an abuse of discretion in that regard, the court's action cannot be disturbed on appeal.

2. On the whole record of a contest over the probate of a will, heard in the county, circuit, and supreme courts, it is *held* that there was no abuse of discretion in disallowing specific items of an executor's account, consisting of counsel fees and disbursements incurred in securing the probate of the will before he had qualified as executor and while he was merely proponent of the will.

[3. Whether sec. 4041*a*, Stats. (Supp. 1906; Laws of 1901, ch. 397), vests in the county court only power to make such an allowance, and, that court having denied it, its action cannot be disturbed on appeal, not determined.]

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This is an appeal from a judgment affirming a judgment of the county court of Rock county disallowing part of the account of *Charles Treloff* as executor of the will of Herman Muellenschlader. The items disallowed were for counsel fees and disbursements incurred in securing the probate of the will of the deceased before said *Treloff* had qualified as executor and while he was merely proponent of the will, which will was presented for probate by said *Treloff*, executor named in the will. The circuit court found substantially as follows: That Herman Muellenschlader died on the 26th day of January, 1904, leaving a will dated the same day; that he left surviving him his widow, *Anna Muellenschlader*, his daughter, *Clara*, aged ten years, and his son, *Herman*, aged seven, his sole heirs at law; that he bequeathed to *Charles Treloff* $2,000, to his daughter and son about $3,000 to be divided equally between them, to his wife and children, in equal shares, the sum of $3,500, stated in said will to be in Weld, Rhine province, Germany, from which bequest nothing has been realized; that to Charles Muellenschlader, his brother, was bequeathed $2,000, stated in said will to be owing from one August Marx, from which bequest nothing has been realized; that the residue of his estate was

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bequeathed to his wife and children in equal shares; that no residue remains; that *Charles Treloff* was named as executor and the estate was appraised at $8,019.16; that said *Charles Treloff* presented the will and his petition for probate to the county court of Rock county on the 2d day of February, 1904; that notice of contest was filed by the guardian *ad litem* in behalf of said infant heirs and by the widow in her own behalf; that a hearing upon the issues was had on the 19th day of April, 1904, and judgment entered denying probate of the will; that on the 15th day of June, 1904, said *Charles Treloff* and Charles Muellenschlader each took appeals from said judgment to the circuit court for Rock county; that on the 29th day of February, 1908, said matter was tried in the circuit court before the court and a jury and the jury returned a verdict advisory to the court therein, and thereafter the judge of said court filed findings of fact and conclusions of law adopting the verdict of said jury, and on the 8th day of April, 1905, entered judgment denying said will to probate; that on the 10th day of July, 1905, said *Charles Treloff* took an appeal from said judgment of the circuit court to the supreme court of the state of Wisconsin, and the judgment of the circuit court was reversed and the case remanded with directions to the circuit court to enter judgment admitting the will to probate and for further proceedings according to law [128 Wis. 364]; that, upon such reversal, costs were taxed in said court in favor of said *Charles Treloff* and against the respondents, widow and children of said deceased, in the sum of $130.30, which sum was charged in the final account of said *Treloff* as executor in said county court and allowed to him in said court out of said estate; that upon the filing of the *remittitur* in the circuit court costs were there taxed in favor of said *Treloff* and against the contestants, said widow and children of deceased, in the sum of $220.75, which sum was charged by said *Treloff* in his final account as executor and allowed to him by the

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county court out of said estate; that such costs included, among other items, $146.40 for drafting bill of exceptions on said appeal and copies thereof, witness fees for J. F. Pember $3.08, and witness fees for E. F. Woods $3.08; that upon the proceedings in said matter in the county court said *Treloff* appeared by George G. Sutherland, his attorney; that in the final account of said *Treloff* as executor he charged said estate $150 for services and disbursements rendered by said Sutherland, and upon the hearing of said final account said item of $150 was allowed out of said estate, and said item included the witness fees for J. F. Pember and E. F. Woods, witnesses called on behalf of said *Charles Treloff* in said will contest in the county court; that William G. Wheeler was employed as attorney for Charles Muellenschlader upon the trial of said matter in the county court, and that the appeal by said Charles Muellenschlader from the judgment of the county court denying said will to probate was taken by said Charles Muellenschlader by William G. Wheeler, his attorney, and the appeal from said judgment by said *Treloff* was taken by George G. Sutherland and William G. Wheeler, his attorneys; that William G. Wheeler was actually employed by said *Treloff*, the proponent and legatee named in said will and the person named as executor in said will, as his attorney upon the will contest in the county court, circuit court, and supreme court, and in the course of such employment rendered services of the reasonable value of $476.25 and incurred expenses amounting to $11.50; that on the trial of said will contest in the county and circuit courts said *Treloff* called as witnesses J. F. Pember and E. F. Woods, both physicians, to testify as experts relative to the mental competency of the testator at the time of making said will; that the reasonable fee of said Woods is the sum of $5; that the reasonable fee of said Pember for time actually spent as such witness, being two days in circuit court and one-half day in county court, at $15 per day, is $37.50.

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As conclusions of law the court found: That there was no abuse of discretion by the county court in refusing to allow said attorney fee of William G. Wheeler and the fees of said E. F. Woods and J. F. Pember as expert witnesses in favor of said *Charles Treloff* in his final account; that the judgment of the county court of Rock county dated December 26, 1907, from which this appeal was taken, should be wholly affirmed, with costs of this court in favor of the widow and children of said deceased against *Charles Treloff*.

Judgment was entered according to the findings of fact and conclusions of law, from which judgment this appeal is taken.

For the appellant the cause was submitted on the brief of *William G. Wheeler*.

For the respondents there was a brief by *Jeffris, Mouat, Smith & Avery*, attorneys, and *John Cunningham*, guardian *ad litem*, and oral argument by *Mr. M. O. Mouat* and *Mr. Cunningham*.

KERWIN, J. As appears from the statement of facts, *Charles Treloff* as executor charged the estate with $150 for services and disbursements rendered for him as proponent and executor named in the will by George Sutherland, and the sum of $220.75 costs taxed in favor of said executor and against the contestants in the circuit court for Rock county on filing the *remittitur* from this court, and $130.30 costs taxed in the supreme court. All of these sums were allowed against the estate in the final settlement of the executor's account, but the bill of Mr. Wheeler, as well as the expert witnesses' fees, were disallowed, and the appellant claims this was error. On the part of the respondent it is insisted that the exercise of discretion by the county court in disallowing the items is not subject to review on appeal under the rule laid down by this court in *In re Gertsen's Will*, 127 Wis. 602, 106 N. W. 1096, and, even if such discretion be subject

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to review, there was no abuse of it in the judgment of the county court. Counsel for respondent makes an extended argument against the power to review the discretion of the county court in the matter before us, and insists that the statute (sec. 4041*a*, Stats.: Supp. 1906; Laws of 1901, ch. 397) vests in such court only the power to make an allowance, and, that court having denied it, its action cannot be disturbed on appeal. But in the view we take of the case it is not necessary to consider the power on appeal to review the discretion of the county court, because, assuming for the purpose of the argument such power exists, we think it clear upon the established facts that there was no abuse of discretion in disallowing the items. Ch. 397, Laws of 1901, being sec. 4041*a*, Stats. (Supp. 1906), provides:

"Any court of record, in contests arising therein, upon application for the probate of any will, in its discretion, may allow to the proponent of such will a reasonable attorney's fee, to be paid out of the estate of the decedent, and may also in its discretion allow to the contestant if successful in the circuit court a reasonable attorney's fee out of said estate for services in such contest in said circuit court."

The above statute manifestly vests in the court having jurisdiction of the probate of the will discretion in making an allowance to the proponent in will contests, and therefore, unless there was an abuse of discretion in disallowing the items complained of, the judgment below cannot be disturbed. It is insisted by appellant that the court below found that Mr. Wheeler was employed by the proponent and executor named in the will in the contest, but it will be observed that the court also found that the executor had other counsel, and, moreover, Mr. Wheeler was employed by Charles Muellenschlader, legatee, who appealed separately. It will be observed, further, that Charles Muellenschlader was interested in the will contest, since he was a legatee to the amount of $2,000, and that he and the executor were the only persons interested in sustaining the will. Upon the whole record we

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are convinced that there was no abuse of discretion in disallowing the items complained of; therefore the judgment below must be affirmed. *Wolf v. Schæffner,* 51 Wis. 53, 81 N. W. 8; *Marx v. Rowlands,* 59 Wis. 110, 17 N. W. 687; *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N. W. 243; *McMahon v. Snyder,* 117 Wis. 463, 94 N. W. 351; *Fox v. Martin,* 108 Wis. 99, 84 N. W. 23.

By the Court.—The judgment of the court below is affirmed.

UECKER, Appellant, vs. TOWN OF CLYMAN, Respondent.

October 23—November 10, 1908.

Highways: Defects: Injuries: Right of action: Accumulation of snow: Pleading: Complaint: Demurrer: Statutes.

1. No right of action exists at common law against municipalities for injuries sustained by reason of a defective highway, and the only provision in our statutes creating a liability, out of which a cause of action might arise on account of a defective highway, is sec. 1339, Stats. (1898).
2. Under sec. 1339, Stats. (1898), as amended by ch. 305, Laws of 1899, no action is maintainable on account of injuries sustained by reason of an accumulation of ice and snow upon any highway, unless the accumulation complained of has continued for three weeks. Hence where a complaint for injuries, alleged to have been occasioned by an accumulation of ice and snow in a highway, fails to allege that such accumulation had existed for three weeks prior to the date of the injury for which the action is brought, no cause of action is stated.
3. Sec. 1249, Stats. (1898), gives no right of action for injuries sustained by reason of a snow blockade in a highway, and, although a highway may be out of repair by reason of its being blockaded with snow, and the town officers may be negligent in failing to remove the blockade as required by sec. 1249, such negligence is not actionable unless it is made so by the provisions of sec. 1339, Stats. (1898).

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APPEAL from an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This action is brought to recover damages alleged to have been sustained by reason of the plaintiff's horses having been injured on a defective highway. The defect complained of was that the defendant town had negligently permitted a certain highway to be blocked with an accumulation of snow for a period of two weeks or more, in violation of the provisions of sec. 1249, Stats. (1898). A general demurrer was interposed to the complaint as not stating cause of action, which demurrer was sustained by the court, and this appeal is taken from the order sustaining the same.

J. E. Malone, for the appellant.

For the respondent there was a brief by *Kading & Kading,* and oral argument by *C. A. Kading.*

BARNES, J. No right of action existed at common law against municipalities for injuries sustained by reason of a defective highway, and the only provision of our statutes creating a liability, out of which a cause of action might arise on account of a defect in a highway, is sec. 1339, Stats. (1898). *Stilling v. Thorp,* 54 Wis. 528, 11 N. W. 906; *Daniels v. Racine,* 98 Wis. 649, 74 N. W. 553; *Morrison v. Eau Claire,* 115 Wis. 538, 92 N. W. 280.

Under sec. 1339, Stats. (1898), as amended by ch. 305, Laws of 1899, no action is maintainable on account of injuries sustained by reason of an accumulation of ice and snow upon any highway, unless the accumulation complained of continued for three weeks. The action before us is brought to recover damages for injuries sustained by reason of an accumulation of snow on a highway. The complaint fails to allege that the accumulation had existed for three weeks prior to the date of the injury for which action is brought; hence no cause of action is stated. Sec. 1249, Stats. (1898), gives no right of action for injuries sustained

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by reason of a snow blockade in a highway. A highway may be out of repair by reason of its being blockaded with snow, and the town officers may be negligent in failing to remove the blockade as provided in sec. 1249, but such negligence is not actionable unless it is made so by sec. 1339. Instead of giving a right of action on account of conditions such as are set forth in the complaint, that section provides expressly that no right of action shall exist on account thereof.

While it may be that the legislature had in mind a different class of cases than the one now before us when it adopted the amendment referred to, yet the defect alleged comes fairly within the language of that amendment, and, that being so, this court would hardly be warranted in indulging in speculation as to what the legislative intent was. *McCabe v. Hammond,* 34 Wis. 590, relied upon by appellant, is in entire harmony with what is here decided. There, as in *Vass v. Waukesha,* 90 Wis. 337, 63 N. W. 280, the defect relied upon was the failure to remove a snow blockade. The right of action, however, in these cases was wholly dependent on sec. 1339.

By the Court.—The order appealed from was correct and must be affirmed.

PALIN, Respondent, vs. PROBERT and another, Appellants.

October 23—November 10, 1908.

Unlawful detainer: Appeal from municipal court: Requisites and proceedings for transfer of the cause.

1. Sec. 3368, Stats. (1898), governing appeals in unlawful detainer actions, provides that such appeals may be taken as in other cases of appeal from justices' courts, that in order to stay proceedings an undertaking shall be filed, and that "*upon taking such appeal* and filing such undertaking" all proceedings shall be stayed; and sec. 3754, which governs appeals in other cases,

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in addition to other requirements, provides that the appellant "*must*, at the time of taking such appeal" and filing the appeal papers with the justice, pay him his fees, together with his fee for the return, the state tax, and the fees for the clerk of the appellate court. In an action on an undertaking on appeal from a judgment of restitution in an unlawful detainer action it appeared that the appellant had neglected to pay such fees. *Held*, that nevertheless the appeal was fully perfected and the undertaking became effective.

2. The provisions of sec. 3754, Stats. (1898), as to payment of fees are not mandatory, nor is such payment a jurisdictional fact, but an effective return may be made by the justice without their payment having in fact been made.

3. Such rule is not affected by the fact that the appeal is taken from a judgment of a municipal court whose judge is placed on a salary, and who is required to collect the ordinary justice's fees and pay them into the public treasury, since it rests with the public authorities to apply the proper remedy for any neglect of the judge of such court to collect such amounts.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

For the appellants there were briefs by *Ryan, Merton & Newbury,* and oral argument by *E. Merton.*

The cause was submitted for the respondent on the brief of *C. E. Armin.*

WINSLOW, C. J. This is an appeal from an order overruling a general demurrer to the complaint. It was alleged in the complaint that in an unlawful detainer action brought by the plaintiff against one Howitt in the municipal court for the eastern district of Waukesha county the plaintiff recovered judgment for the restitution of certain premises, with costs; that on the following day Howitt duly filed a notice and affidavit for an appeal, together with an undertaking signed by the defendants as sureties, conditioned to pay the costs of the appeal and pay all rent and other damages accruing to the plaintiff pending the appeal; that said Howitt failed at any time to pay the costs required to be paid by

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law in order to perfect his appeal, and said appeal lapsed, but that the execution of the judgment was stayed by the giving of the undertaking, whereby the plaintiff was damaged by losing the rent of the premises for twenty days, and judgment was demanded for the amount so lost. The defendants claim that the appeal was never perfected by the payment of the costs and other items required to be paid by sec. 3754, Stats. (1898), and hence that the proceedings were never stayed by the undertaking, but that the writ of restitution might have been issued at any time. The argument is that there must be a fully perfected appeal before the undertaking becomes effective to stay proceedings, and that until the payment of the items aforesaid there is in fact no appeal.

Sec. 3368, Stats. (1898), provides that the appeal in unlawful detainer actions may be taken as in other cases of appeal from justices' courts, and that in order to stay proceedings an undertaking such as was given here shall be filed, and, further, that "*upon taking such appeal* and filing such undertaking" all proceedings shall be stayed. Sec. 3754, Stats. (1898), which governs appeals in other cases, requires the filing of a notice and affidavit of good faith, and further provides that the appellant "*must,* at the time of presenting" such papers to the justice, pay him his fees, together with $1 for the return, $1 for state tax, and $2 clerk's fees for the clerk of the appellate court.

The argument that this requirement is mandatory, and that full compliance with it is necessary in order to make the appeal effective for any purpose, would be strong were it not for the provisions of sec. 3763, Stats. (1898), and the construction placed upon the two sections [secs. 3754, 3763, Stats. 1898] by the case of *Golling v. Harder,* 14 Wis. 86. The last-named section provides that the justice shall not be bound to make his return unless his fees and the other amounts named are paid at the time of the service of the no-

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tice of the appeal, and it was held in the *Golling Case* that this provision clearly showed that the payment of the fees and tax were not jurisdictional facts, but that the justice might make an effective return without the payment having been made. It was there said that by the last-named provisions "the legislature have recognized the existence of the appeal independent of such payment," and, further, that the justice's own fees "are always subject to his control, and, if he neglects his duty as to the [state] tax, it rests with the public authorities to apply the proper remedy." This construction was followed in the very recent case of *Mead v. Simpson,* 134 Wis. 451, 114 N. W. 821, and it seems to be decisive of this case. If the appeal existed independent of the payment, as held in the *Golling Case,* then the undertaking became effective and stayed proceedings. It is true that the judge of the municipal court in which the action was tried is placed upon a salary by the terms of the act creating the court, and that he simply collects the ordinary justice's fees, and is required to pay them into the public treasuries of the city and county of Waukesha in certain proportions (sec. 13, ch. 91, Laws of 1897), but this does not affect the question, because, as held in the *Golling Case,* if he neglects his duty as to the amounts which he is required to collect as a public agent (in that case the state tax), "it rests with the public authorities to apply the proper remedy."

By the Court.—Order affirmed.

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ANDERSON, Appellant, vs. SAVOY, Respondent.

October 23—November 10, 1908.

Appeal and error: Findings: Conclusiveness: Sales: Breaches: Right of action: Waiver: Measure of damages: Evidence.

1. Findings of fact not contrary to the clear preponderance of the evidence will not be disturbed on appeal.
2. In an action on a contract for the sale of ice, a finding that the contract was modified by mutual agreement as to delivery of the full amount within the agreed time, is more in the nature of a conclusion of law than one of fact.
3. Plaintiff, under a contract for the sale of 400 tons of ice to be loaded for shipment from time to time as demanded by plaintiff between April 1 and October 1, ordered ice and received and used the same notwithstanding defendant had breached the agreement by failing to ship two cars a week as demanded and to pack that which was shipped in the manner agreed upon, and the defendant continued to ship ice within a reasonable time on orders notwithstanding plaintiff had not paid for prior shipments according to contract. It was undisputed that had ice been shipped at the rate of two cars per week as demanded, all would have been delivered within the time agreed upon, and that plaintiff had use therefor and did not refuse to receive ice until the close of the season and after the time limited by the contract for making deliveries. *Held*, that it was not a necessary inference from such circumstances that plaintiff waived the provisions of the agreement entitling him to the full amount, or that the minds of the parties met as to such waiver.
4. While plaintiff's demand for and receipt and appropriation of ice without objection, notwithstanding the breach, bound him to pay for what he obtained, it did not necessarily affect his right to damages caused by the delay in shipping according to the demand of two cars per week or for failure to seasonably forward to the full amount, and his conduct in that regard and defendant's consent to ship ice notwithstanding the delayed payments are perfectly consistent with plaintiff's retention of such right.
5. Damages for breach of contract, under ordinary circumstances, are limited to such as may be considered to arise according to the usual course of things from such breach and so must be regarded, reasonably, as having been in contemplation by the parties at the time of making the contract as the probable result of the breach of it, or, in the case of special circumstances,

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such as may reasonably be supposed to have been in such contemplation in view thereof so far as such special circumstances were known to the parties at the time of making the contract.

6. Where plaintiff, under a contract for the sale of 400 tons of ice to be loaded for shipment from time to time as demanded by plaintiff between April 1 and October 1, ordered ice and received and used the same notwithstanding defendant had breached the agreement by failing to ship two cars a week as demanded, it is *held*, under the evidence, stated in the opinion, that there were no special circumstances to be dealt with in determining the damages to which plaintiff was entitled.

7. In such case the true measure of damages as to the ice not delivered is the difference between what the ice would have cost the plaintiff under the contract when he should have received the same and the fair market value at such time, with interest thereon, in case ice was reasonably obtainable in the market; otherwise the difference between the cost and what ice would have been actually worth to him when he ought to have received it.

TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Action to recover damages for breach of contract.

The cause was tried by a referee, who found as facts thus: February 17, 1904, defendant contracted to furnish plaintiff 400 tons of ice at $1 per ton, f. o. b. cars at Pewaukee, Wisconsin, shipments to be made at such times between April 1, 1904, and October 1, 1904, as demanded by plaintiff. One hundred dollars was paid down on the contract, and it was agreed that after delivery of 100 tons of ice settlements should be made weekly. In the latter part of May or first part of June, 1904, plaintiff demanded shipments of ice to commence and within a day or two one carload was sent forward. Thereafter whenever plaintiff demanded ice a carload was sent, up to July 7, 1904, at which time he demanded shipment of two cars a week, one on Tuesday and one on Friday, which request was not complied with. Nevertheless plaintiff continued to demand shipments of ice and from time to time some was shipped and accepted without objec-

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tion. Defendant shipped ice to plaintiff without objection notwithstanding plaintiff failed to make weekly settlements according to the contract. Business was carried on as indicated till some time in October, 1904, when defendant was notified not to ship any more ice, whereupon he billed to plaintiff the ice shipped up to that time, giving him credit for payments made, and after mutual examination of the bill plaintiff told defendant he could not pay presently but would settle in a week. Plaintiff received and accepted 126 tons and 100 pounds of ice not settled for at the time of the commencement of the action. Some demurrage charges paid by plaintiff were incurred by his own neglect to unload cars according to the rules of the railroad company. He was required to pay full carload rates on some cars which, by fault of defendant, were not filled to their capacity, whereby he was damaged to the amount of $1. The written contract was modified by the conduct of plaintiff in ordering ice notwithstanding defendant had failed to strictly comply therewith, and the shipment of ice by defendant and acceptance of the same by plaintiff notwithstanding the latter's neglect to make weekly settlements as agreed upon. Plaintiff is entitled to credit for the $1 aforesaid, and defendant is entitled to judgment for $126.10, less the $1 allowed plaintiff. Judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of *McGee & Jeger,* and for the respondent on that of *C. E. Armin.*

MARSHALL, J. The findings of fact, so called, do not appear to be contrary to the clear preponderance of the evidence, therefore they should not be disturbed. The one to the effect that the written contract for a sale by defendant to plaintiff of 400 tons of ice f. o. b. cars Pewaukee at a stipulated price, the same to be loaded for shipment from time to time as demanded by plaintiff between April 1 and October

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1, 1904, was modified by mutual agreement as to delivery of the full amount within such time, is more in the nature of a conclusion of law than one of fact. It is based on these evidentiary circumstances: Appellant ordered ice and received and used the same notwithstanding respondent had breached the agreement by failing to ship two cars per week as demanded and to pack that which had been shipped in the manner agreed upon, and respondent continued to ship ice within a reasonable time on orders notwithstanding appellant had not paid for prior shipments according to contract.

Since it is undisputed in the evidence that had ice been shipped at the rate of two cars per week as demanded all would have been delivered within the time agreed upon and plaintiff had use therefor and did not refuse to receive ice till the close of the season and after the time limited by the writing for making deliveries, we are unable to see how it can be rightly said that the necessary inference from the circumstances found is that plaintiff waived the provision of the agreement entitling him to the full amount, or that the situation disclosed any probability that the minds of the parties met as to such waiver.

Appellant's demand for and receipt and appropriation of ice without objection, notwithstanding the breach, bound him to pay for what he obtained as being the kind of product contracted for, but did not, necessarily, affect his right to damages caused by the delay in shipping according to the demand for two cars per week or for failure to seasonably forward the full amount. His conduct in that regard and respondent's consent to ship ice notwithstanding the delayed payments are perfectly consistent with the former's retention of such right.

Though the foregoing requires a reversal of the judgment there is an insuperable difficulty in the litigation being finally terminated without some further proceedings in the trial court. The evidence in the record does not furnish any

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legitimate basis for an assessment of damages according to the rules governing the subject.

No principle is better established than that damages for breach of contract, under ordinary circumstances, are limited to such as may be considered to arise according to the usual course of things from such breach and so must be regarded, reasonably, as having been in contemplation by the parties at the time of making the contract as the probable result of the breach of it, or, in case of special circumstances, such as may reasonably be supposed to have been in such contemplation in view thereof so far as such special circumstances were known to both parties at the time of such making. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Gross v. Heckert,* 120 Wis. 314, 321, 97 N. W. 952. It is considered that there are no such special circumstances to be dealt with in this case. For aught that appears the contract was for the sale, delivery, and receipt of and payment for an ordinary article of merchandise during the late spring, the summer, and late fall months; an article not obtainable readily, and sometimes not at all, in large quantities, unless contracted for before the season opens or is far advanced, and which appellant depended upon, as is usually the case, to supply his retail trade during the season of active demand. The true measure of damages as to the property not delivered in such a case is the difference between what the same would have cost the purchaser under the contract when he should have received the same and the fair market value at such time with interest thereon in case of the subject of the transaction being reasonably obtainable in the market, otherwise the difference between such cost and what the property would have been actually worth to him when he ought to have received the same. *Hill v. Chipman,* 59 Wis. 211, 18 N. W. 160; *Muenchow v. Roberts,* 77 Wis. 520, 522, 46 N. W. 802; *T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513; *Kelley, Maus & Co. v. La Crosse C. Co.* 120 Wis. 84, 91, 97 N. W. 674.

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The evidence in the record does not show with sufficient definiteness to warrant this court in finding that ice sufficient to make up the deficiency was not reasonably obtainable in the market at appellant's place or within practical reach therefrom. But if it were otherwise there is no proof of what ice shipped according to the contract would have been worth to appellant had the same been forwarded as agreed upon. The price he could have retailed the ice for is not the test. The evidence leaves the matter at that point. It was assumed that railroad weights at the shipping point would hold out in the retail trade at the delivery point, while it would seem that the fact may or must have been otherwise. In the very nature of things, the loss by melting and by cutting into shapes and quantities for customers would have been considerable. On the whole, it does not seem that there has been a fair trial of the question of damages with a proper appreciation of the legal rules applicable to the situation, so the court is of the opinion that the judgment must be reversed and the cause remanded for a new trial as to the amount of damages appellant is entitled to recover.

By the Court.—So ordered.

TIMLIN, J. (*dissenting*). This was an action at law for breach of the following contract: The defendant, residing at Pewaukee, agreed to furnish the plaintiff, residing at Wauwatosa, 400 tons of square ice for and at the agreed price of $1 per ton f. o. b. Pewaukee, railroad weights to be and govern the weight of the ice, and the ice to be loaded on cars and shipped at such time and times between April 1, 1904, and October 1, 1904, as demanded by the plaintiff, and the plaintiff agreed to pay $100 therefor at the signing of the agreement to apply on the first 100 tons of ice delivered, and after this quantity delivered to settle on each Monday for all ice shipped.

The findings supported by evidence established that the plaintiff demanded ice under this contract about June 1st by

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telephone, and in the same manner thereafter, all of which he received. On July 7, 1904, plaintiff demanded that the defendant ship him two cars of ice every week thereafter, one on Tuesday and one on Friday. The defendant did not comply with this request, and the plaintiff resumed ordering ice by telephone, as he had been doing prior to this request, and the ice was delivered upon these subsequent telephone orders until about the middle of October, 1904, when plaintiff informed defendant that he need not ship any more ice. The defendant shipped ice as aforesaid after July 7, 1904, to the plaintiff, and continued to do so without objection, and plaintiff failed to settle for the ice on Monday of each week as agreed, and in that manner the parties continued to order and receive ice between the 7th day of July and the middle of October, 1904, all such orders by the plaintiff being filled except that of July 7th. Upon this the referee found as a conclusion of law, and such finding was confirmed by the court, as follows: "That the written contract of the parties to the above entitled action was modified by them by their subsequent conduct and dealing with reference thereto." The plaintiff was denied any right to recover on account of failure to ship two cars per week from and after July 7th, and for this reason he appeals.

I can see no reason for reversing the judgment of the court below in this case. The contract above quoted required the ice to be delivered as demanded by the plaintiff. It seems to me that this was done. One of his demands was not complied with, and he then substituted other and different demands, which were complied with. This was all done orally by telephone. It seems to me purely a question of fact whether or not the parties to this contract intended and understood that the mode of delivery between July 7 and October 15, 1904, was mutually satisfactory. In one sense the ice was delivered "as demanded by the second party;" that is to say, his later and substituted demands were complied with.

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But there is another view of the facts calling for affirmance. After the order of July 7th for two carloads a week until the whole amount remaining undelivered was shipped, and the failure of the defendant to comply with that order, there was at the expiration of the first week thereafter a total breach of the contract. The plaintiff was entitled to his damages, but was not entitled to treat the contract as in force and also as breached. He elected to treat the contract as in force, and went on demanding and receiving ice thereunder as if the contract was in force. *Voss v. N. W. Nat. L. Ins. Co., post,* p. 492, 118 N. W. 212, and cases cited in the opinion. By not standing upon the breach, but thereafter claiming and receiving advantages under the contract, he waived the breach. In the words of the present chief justice in *Woodman v. Blue Grass L. Co.* 125 Wis. 489, at page 495 (104 N. W. 921), "he cannot treat the repudiation both as a breach and as no breach at the same time"—citing Benj. Sales (7th Am. ed.) § 568; Anson, Cont. (2d Am. ed.) 371.

It is not in the case at bar a question of waiver of the right to rescind, or of waiver of the right to recover damages, but is a waiver of the alleged breach of July 7th by demanding and accepting thereafter a different or modified performance under a contract which gave the plaintiff the right to direct the manner and time of shipment.

STEELE, Respondent, vs. KORN, Appellant, and others, imp., Respondents.

October 24—November 10, 1908.

Pleading: Demurrer: Costs: Appeal and error: Exceptions, when considered: Wills: Construction: Liability of devisee taking possession of lands charged with legacy: Interest devised: Life estates: Enforcement of legacy charged on real estate.

1. **An exception to the court's ruling on defendant's demurrer on the ground of defect of parties defendant need not be considered, where it appears that on consent of the parties the alleged**

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defect has been cured by an order making the alleged necessary party a defendant.

2. In such case the imposition of $10 costs as a condition of answering on overruling defendant's demurrer furnishes no basis of complaint, where it appears that defendant participated in the trial to the extent of offering his evidence and presenting his claims to the court by counsel, since he was thus practically afforded the same privileges as if he had served an answer denying the right to the judgment as rendered.

3. Where a devisee of lands accepts the devise and takes possession thereof under such devise, he becomes personally liable to pay a legacy charged thereon when it becomes payable by law. The situation of the devisee, then, is that of owner of the property subject to a lien thereon, which he had agreed to pay, and which may be foreclosed and enforced at any time after it falls due.

4. A will which devises real estate to K. for life, with remainder over to his issue, and, if he should leave no issue, then the remainder over to testator's grandchildren who might be living at the time of K.'s death, is *held* to limit K.'s interest to his life.

5. Testator devised lands to K. for life, with remainder over, and K. took possession thereof. Plaintiff, a legatee whose legacy was chargeable on the same lands, brought suit to foreclose and enforce her lien. It appeared that K.'s estate in the lands would, in all probability, sell for a meager sum on account of its uncertain duration, and for the same reason a separate sale of the estate in remainder would probably fail to bring a reasonably fair price, and the selling of such interests separately would operate to the injury of all parties interested in the land. *Held*, under the circumstances presented, that the court should adopt the course which, in freeing the property from the lien of plaintiff, would least threaten loss to the estate and which would promote the interests of all owners, and to accomplish this result the whole property in fee simple should be sold and converted into its equivalent in money and dealt with in this form as realty.

6. In such case the value of K.'s estate in the whole proceeds should be ascertained under the rules for computing the value of life estates, and be taken out of the selling price of the whole estate and applied to the payment of plaintiff's judgment, any balance after satisfying the judgment to be paid to K. as the absolute owner thereof.

7. In such case, in the event that the amount found to be the value of K.'s estate is insufficient to satisfy plaintiff's judgment, then a sum which, when added to K.'s estate, will be sufficient to

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satisfy the judgment, should be taken out of the estate in remainder.

8. In such case whatever estate in remainder is not required to satisfy the judgment should be placed in charge of a trustee to administer and hold for accumulation for the persons entitled thereto at the time of the death of K.

9. On a motion to correct the record it is *held* that the interest of K. in the lands involved is as stated in *Korn v. Friz*, 128 Wis. 428, but that such holding in no way affects the correctness of the decision on this appeal and does not call for any modification of the mandate.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Reversed.*

This is an action for the collection of a legacy and the enforcement of the lien created thereby upon the real estate specified in the will of plaintiff's father, Henry Korn, deceased. *William Korn* has a life interest in the real estate charged with the lien. After his death the property is devised to his issue then living, and, if he dies without issue then living, then it is devised to the living grandchild or children of the testator. The original parties defendant in this action were *William Korn,* Alice Korn, his daughter, *Henry Nelson Friz, Marion Friz,* Charles F. Steele, Mary E. Steele, and William H. Steele, grandchildren of Henry Korn, and Etta R. Steele, wife of William H. Steele, all of whom are alleged to claim an interest in this real estate. The complaint sets forth the claim of plaintiff, the death of Henry Korn, the fact that he left a will and devised the real estate in question to his son *William* upon the condition therein stated, and bequeathed to plaintiff, his daughter, $5,000, to be paid to her by *William,* and which is made a charge upon the real estate devised to *William.* The remainder over was devised to *William's* children, and, if he should leave no issue living at the time of his death, then to testator's grandchildren, as above stated. For a detailed statement of the facts concerning the estate, the death of Henry Korn, the nature of the provisions of his will, and the devisees and legatees under it, and the proceedings for a con-

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struction of it, see the report of the case of *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659.

William Korn demurred to the complaint on the ground that there was a defect of parties in that it omitted to make Florence Korn, his wife, a party, she having dower and homestead rights in the land and being therefore a necessary party. The trial court overruled the demurrer and allowed *William Korn* thirty days to answer upon payment of $10. *William Korn* did not answer. The court thereafter entered consent orders, agreed to by *William Korn,* dismissing the case as to Alice Korn and making Florence Korn a party defendant, and she was served with summons and complaint. All of the defendants except the two *Friz* minors defaulted. They answered, admitting plaintiff's claim, but demanded that personal judgment be enforced against *William Korn,* and if such judgment could not be satisfied out of his property, aside from his interest in the real estate devised by the will, that his interest so acquired by him under the will might first be sold for satisfaction of plaintiff's claim, and, if his property and interest in such real estate so devised to him did not satisfy plaintiff's claim, that the whole interest in such real estate might be sold, and so much of the proceeds applied to the payment of plaintiff's claim as might be necessary when added to the sums realized out of *William's* property and the value of his interest in such real estate. The court heard the application and took proof of the material allegations. *William Korn* took part as a party to the action, and insisted that the whole of the real estate be sold to satisfy plaintiff's claim. The guardian *ad litem* appeared and demanded that judgment be awarded holding *William* primarily liable for plaintiff's claim, and that his property and interest in the real estate devised to him by the will be first applied in satisfaction of plaintiff's judgment.

The court made findings covering the material allegations, which are not in dispute, and awarded judgment in plaintiff's favor against *William Korn* for $5,000, with interest from

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January 11, 1906, the date it became due, and costs of this action. Such judgment was decreed to be a lien on the interest of *William Korn* in the real estate devised by his father, and the interest of *William* was decreed to be primarily liable for the payment of plaintiff's judgment. The judgment was furthermore decreed to be a lien on the remaining interests in this real estate, in which the other defendants have a contingent interest, and plaintiff was adjudged to have the right to sell these interests in such real estate to satisfy the judgment. The judgment further directed that the sheriff of Waukesha county, at the expiration of four months from the date, offer for sale to satisfy the judgment, first, the interest of *William Korn* in this real estate; if a sufficient sum should not be offered to satisfy the judgment, then the sheriff was directed not to make sale thereof, but thereupon to offer and sell the fee-simple absolute of all the real estate, unless the judgment should first be paid within the four months. The sheriff was directed to pay the judgment and the costs of sale out of the proceeds of the sale, to make report, and deposit the surplus with the clerk of the court. Upon confirmation of the sale, deeds were to be issued and the possession of the premises to be delivered to the purchaser, and the defendants thereafter were to be forever barred and foreclosed of all right, title, interest, and equity of redemption in the real estate unless it should be redeemed as provided. The defendant *William Korn* appeals from this judgment.

For the appellant there was a brief by *Tullar & Lockney,* and oral argument by *D. S. Tullar.*

For the plaintiff and respondent there was a brief by *Frame & Blackstone,* and oral argument by *H. J. Frame.*

The cause was submitted for the minor respondents on the brief of *Ryan, Merton & Newbury.*

SIEBECKER, J. The exception to the court's ruling on defendant's demurrer to the complaint upon the ground that it

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appeared that there was a defect of parties defendant to the action need not be considered, since he consented to the dismissal of the action as to Alice Korn and to making Florence Korn a party defendant. The imposition of $10 costs as a condition of answering furnished no basis for complaint. The imposition of terms was proper under the circumstances. Furthermore, it appears that the appellant participated in the proceedings and the trial to the extent of offering his evidence and of presenting his claims to the court by counsel. This practically afforded him the same privileges as if he had served an answer denying the right to judgment of foreclosure as rendered by the court.

Appellant contends that the court erred in awarding judgment against him personally for the amount of plaintiff's legacy and in making the interest he acquired in the real estate under his father's will primarily liable for payment of this legacy. In the action of *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659, it was determined that the appellant in the instant action took the real estate devised to him upon the condition that he pay to testator's daughter, the plaintiff in this action, the sum of $5,000, and that she had the right to a lien or charge for that amount upon the land devised to appellant, which could be enforced against the land. It appears that appellant has taken possession of this property under the will devising it to him. The result is as stated in *Merton v. O'Brien,* 117 Wis. 437, 94 N. W. 340:

"By accepting the devise, and taking possession thereof under the devise, he doubtless became personally liable to pay the charge thereon when it became payable by law. [Citing cases.] His situation, then, was that he owned real property subject to a lien thereon, which he had agreed to pay, and which might be foreclosed and enforced at any time after it fell due."

The holding of the trial court is to this effect, and it rendered judgment against appellant for the amount of the legacy he thus agreed to pay, and, in default of such pay-

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ment, awarded judgment of foreclosure and sale of his interest in the premises, and, if appellant's interest in the lands should fail to sell for a sum sufficient to discharge the plaintiff's demand, then the judgment of foreclosure and sale was against the interests of all those owning the land. There is no question but that the plaintiff is entitled to have the lands sold under foreclosure judgment. *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659. The will devised the real estate to appellant for life, with remainder over to his issue, and, if he should leave no issue, then the remainder over was devised to the testator's grandchildren who might be living at the time of *William's* death. This limited appellant's interest to his life.

It is apparent that appellant's estate in this land will, in all probability, sell for a meager sum on account of its uncertain duration, and for the same reason a separate sale of the estate in remainder will probably fail to bring a reasonably fair price. The selling of these interests separately will operate to the injury of all parties interested in the land. The trial court found that the sale of the premises as a whole would be to the advantage and best interest of all parties. Under the circumstances presented the court must adopt the course which, in freeing the property from the lien of the plaintiff, will least threaten loss to the estates and which will promote the interests of all the owners. "To accomplish this result the interests in remainder are to be preserved, as nearly as the circumstances will permit, as the creator of them has provided," and, if this cannot be effected by selling a part of the real estate, then the whole may be converted into its equivalent in money and dealt with in this form as realty. *In re Kingston's Estate,* 130 Wis. 560, 110 N. W. 417; *Ruggles v. Tyson,* 104 Wis. 500, 79 N. W. 766, 81 N. W. 367. Under these circumstances it is manifest that a sale of the whole property in fee simple will operate to the advantage of all the owners. The value of appellant's

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life estate in the whole proceeds may readily be ascertained under the rules for computing the value of such estates, and it may be taken out of the selling price of the whole estate and applied in payment of plaintiff's judgment. If there be a balance over and above the amount required to satisfy the judgment, such balance should be paid to him as absolute owner thereof.

In the event that the amount found to be the value of appellant's life estate is insufficient to satisfy plaintiff's judgment, then a sum which, when added to the life estate, will be sufficient to satisfy the judgment must be taken out of the estate in remainder. Whatever estate in remainder is not required to satisfy the judgment must be placed in charge of a trustee to administer and hold for accumulation for the persons entitled thereto at the time of the death of appellant, the life tenant.

In view of these considerations the judgment entered by the trial court is erroneous and must be reversed, and the cause remanded to the trial court with directions to enter judgment upon the record in accord with this opinion.

By the Court.—It is so ordered.

The following opinion was filed March 9, 1909:

SIEBECKER, J. The appellant moves for a correction of the record, which in effect states that the will of Henry Korn, deceased, devised the property in question to *William Korn* for life, with remainder over to his issue; that *William Korn's* interest is limited to a life estate, and that after his death the property is devised to his issue then living. The case of *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659, discloses that in deciding the question then presented the court regarded the interest of *William Korn* in the real estate devised to him by his father, Henry Korn, deceased, as a fee, determinable at his death if he should die without issue, and

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considered that a determination of the nature and quality of his estate was necessarily involved in the question then presented. It was declared to be a "base fee." As between the parties, the decision then made must be regarded as the law of the case, and it cannot be changed on this appeal.

In a statement of the opinion in the instant case the estate devised by the will of Henry Korn, deceased, to his son *William* is referred to as a life estate with remainder over to his children. In view of the former decision in *Korn v. Friz, supra,* this is erroneous and must be so regarded. When the question of *William's* interest in this real estate under his father's will has been passed upon by this court, that decision, whether right or wrong, becomes the law of the case and binds the parties. *Cole v. Clarke,* 3 Wis. 323.

This condition of the record in no way affects the correctness of the decision on this appeal and does not call for a modification of the mandate. It is to be understood that whenever *William Korn's* interest is referred to in the record, such an interest is meant as the case of *Korn v. Friz, supra,* holds that he acquired.

By the Court.—The motion is denied. No motion costs are to be taxed against either party.

ZOERB, Appellant, vs. PAETZ, Administrator, and others, Respondents.

September 8—November 27, 1908.

Deeds: Delivery: Escrow: Statute of frauds.

1. It is the intent to pass title which makes the delivery of a deed effective, although mere mental reservation on the part of the grantor cannot affect that question.
2. Where an agreement, as understood by both parties, is that delivery of a deed is not to be made nor title pass until conditions, precedent or concurrent, are performed, a mere manual

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tradition of the deed under the mistaken supposition that these prerequisites had been fulfilled, when in fact they had not, will not pass title irrevocably.

3. Where neither party to an attempted transfer of title to lands had definite knowledge of the character of the papers or agreements necessary to carry out their understanding, but mutually relied upon the scrivener to decide that question and prepare the papers, the intention of the scrivener as to the papers necessary to complete the transaction is in legal effect the intention of the parties, and his forgetfulness and consequent mistake in handing over a deed before a material part of the transaction had been performed is the forgetfulness and mistake of both parties, for the correction of which a court of equity will afford relief by cancellation of the deed.

4. A vendor, who proposed to convey land in consideration of the purchaser's agreement to support the vendor, delivered the fully executed deed to the scrivener, who drew the necessary papers to carry out the agreement of the parties, with oral direction to deliver the same to the purchaser when his wife had joined in the bond and mortgage securing such support. Before the wife had signed the vendor died and thereafter the scrivener handed the deed to the purchaser. *Held*, that the delivery of the deed to the scrivener did not constitute a valid delivery in escrow.

5. In such case, even if there could be a valid escrow, it was ineffectual in the absence of a valid written agreement to convey the land, such as would satisfy the statute of frauds, deposited with the deed.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Two equitable actions were consolidated and tried together. The first action was brought by *Paetz,* as administrator of the estate of one Louisa Kautz, deceased, to set aside and cancel a deed of lands executed by her to *Zoerb* a week before her death, on the ground that the deed was obtained by fraud and was never in fact delivered. The second action was afterward brought by *Zoerb,* alleging a mutual mistake in the description of part of the lands included in the deed and praying reformation thereof in this respect. In the latter action the defendant put in a counterclaim containing substantially the allegations of his complaint in the

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first action. To this counterclaim a reply was served, and the two actions were then consolidated. All the heirs at law of Mrs. Kautz are parties to the consolidated action. There was very little material dispute as to the facts. Louisa Kautz, the intestate, was an aged and infirm widow, owning forty acres of farm land in Manitowoc county and eighty acres in Kewaunee, and living alone upon the Manitowoc land, which was her homestead, and possessing household furniture, stock, and farming implements. Her heirs consisted of a number of nephews and nieces and children of deceased nephews and nieces. The plaintiff was a son of one of the nieces and was a married man living in the town of Menominee, Michigan. He came to Mrs. Kautz's home from Menominee in the latter part of June, 1905, and remained there several days, his wife remaining in Michigan. During this time negotiations were had between him and Mrs. Kautz looking towards the deeding of the lands in question to *Zoerb* in consideration of an agreement to support and care for Mrs. Kautz during her life. These negotiations resulted in the calling in of Adolph Chloupek, a lawyer and notary public residing at Mishicott, eight miles distant, on July 3, 1905, to draw the papers necessary to carry out the agreement which had been made. Neither of the parties knew what form the papers were to take, but both relied on Mr. Chloupek to draw such papers as were necessary to give effect to the agreement. Mr. Chloupek came to the house, and, after talking with the parties, advised the making of a deed of the lands and a bill of sale of the personal property of the homestead to *Zoerb* and the giving back of a bond for care and support secured by mortgage on the lands conveyed. This being satisfactory to the parties he proceeded to draw the papers. He determined in his own mind that it would be better to have Mrs. Zoerb join in executing the bond and mortgage with her husband, but did not inform the parties of this conclusion at the time. Having learned the details of the arrangement he drew a bill of sale of the

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personal property and a warranty deed of the lands to *Zoerb* (inserting, however, by mistake an erroneous description of the Kewaunee county lands) and a bond for care and support in the penal sum of $3,000, in form making both *Zoerb* and his wife promisors, and a mortgage on the lands also to be executed by *Zoerb* and his wife to secure performance of the conditions of the bond. The conditions were numerous, and provided for support and personal care in sickness and health, for board in case she chose to board with the Zoerbs, and for certain quantities of provisions annually in case she chose to board herself, for a certain cash payment each year, for the use by her of certain rooms in the house, for the cleaning and scrubbing of those rooms, for the furnishing of firewood and water, and other things. The consideration named in the deed was one dollar and other valuable considerations. When the papers were completed Chloupek temporarily forgot that Mrs. Zoerb was to sign them, and had Mrs. Kautz sign the deed and bill of sale and *Mr. Zoerb* the bond and mortgage, and all the papers were formally delivered. *Zoerb* paid the dollar, and both parties supposed that the transaction was complete. The parties did not separate, however, but remained in conversation for nearly or quite half an hour, when Chloupek suddenly remembered that he had intended to have Mrs. Zoerb sign the bond and mortgage, and he immediately called attention to the omission and stated that, though not absolutely necessary, still he had intended that she should sign, and he thought it safer to have her do so, and advised that the deed, bond, and mortgage be placed in his hands to be held until Mrs. Zoerb should come from Michigan and sign the bond and mortgage with her husband, when he would deliver the papers. Both the parties readily agreed to this, and Chloupek took back all the papers, except the bill of sale, to his home. Mrs. Kautz died on the morning of July 10th following, and *Mr.* and Mrs. Zoerb came to Chloupek's house in the afternoon of the same day, and Mrs. Zoerb then offered to sign

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the bond and mortgage, but Chloupek declined to allow her to do so because of Mrs. Kautz's death. Chloupek then delivered the deed to *Zoerb*. The bill of sale remained in *Zoerb's* hands from the time of its delivery on July 3d. The bond and mortgage were retained by Chloupek and were put in the hands of the clerk of court upon the trial. After the transaction of July 3d *Zoerb* remained at Mrs. Kautz's homestead doing chores until July 5th, and then returned to Michigan to get his wife, leaving a person on the farm to do the chores and help Mrs. Kautz. After Mrs. Kautz's death *Zoerb* moved into the homestead and took possession of the land in Kewaunee county, and has sinco retained such possession. The court found that Mrs. Kautz was competent to transact business, that there was no fraud or overreaching, but that there was no complete delivery of the deed, or, if there was, that *Zoerb* was estopped by his conduct in consenting to the subsequent holding of the papers by Chloupek to claim that there had been a delivery, and denied *Zoerb* any relief. The court further held that the respondents were entitled to a cancellation of the deed, but he stayed the execution of the judgment for sixty days in order to give *Zoerb* time to bring an action for specific performance if he were so advised, not deciding, however, whether he was entitled to relief in such an action because the issue was not presented by the pleadings. From judgment in accordance with the findings *Zoerb* appeals.

For the appellant there was a brief by *Burke & Craite* and *C. H. Sedgwick,* and oral argument by *Isaac Craite.*

For the respondents there was a brief by *J. S. Anderson,* attorney, and *L. J. Nash,* of counsel, and oral argument by *Mr. Anderson.*

The following opinion was filed September 29, 1908:

WINSLOW, C. J. The appellant strenuously contends that the first delivery of the deed to him was an absolute delivery, which passed title, and that he could not be divested

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of title by merely handing the same back to the scrivener, nor by anything short of the execution and delivery of another deed by himself. As a general proposition it is true that delivery of a deed with intent to pass title does pass the title, and that the surrender or cancellation of such deed does not revest the title in the vendor. *Slaughter v. Bernards,* 97 Wis. 184, 72 N. W. 977. No one would contend, however, that the handing over of a deed merely for purposes of examination, or by mistake supposing it to be another paper, would carry any title to the grantee, although there would in both cases be manual tradition of the document to the grantee. It is the intent to pass title which makes the delivery effective, although mere mental reservation on the part of the grantor cannot affect the question. *Rogers v. Rogers,* 53 Wis. 36, 10 N. W. 2. When, however, the agreement as understood by both parties is that delivery is not to be made nor title pass until precedent or concurrent conditions are performed or agreements made by or on behalf of the grantee, a mere manual tradition of the deed under the mistaken supposition that these prerequisites had been fulfilled, when in fact they had not, will not pass title irrevocably. In such case the whole transaction is incomplete, and, as in other cases of mutual and material mistake, a court of equity has ample power to cancel the apparent conveyance in the same manner as it may cancel other instruments under such circumstances. *De Voin v. De Voin,* 76 Wis. 66, 44 N. W. 839.

In the present case neither party had definite knowledge of the character of the papers or agreements necessary to carry out their understanding, but they mutually relied on Chloupek to decide that question and prepare the papers. Chloupek decided that, in order to render the transaction entirely safe for Mrs. Kautz, the bond and mortgage should be signed by Mrs. Zoerb as well as by her husband, and this course was manifestly desirable because of the many pro-

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visions in the bond requiring personal service and attention which could only be properly performed by a woman. He drew the papers intending that she should so sign and that the transaction should not be completed until she did sign. Under the circumstances his intention was in legal effect the intention of both parties, and his forgetfulness and consequent mistake in handing over the papers before a material part of the transaction had been performed was the forgetfulness and mistake of both parties, for the correction of which a court of equity will afford relief by cancellation of the deed.

But it is contended that the subsequent delivery of the papers to Chloupek, with directions to deliver the deed to *Zoerb* when his wife had executed the bond and mortgage, constitute a valid delivery in escrow. This contention is fully met and answered by reference to the case of *Campbell v. Thomas,* 42 Wis. 437, which presented practically the same question. Granting that there could be a valid escrow upon such a condition as is here presented, still there was no valid written agreement to convey the land, such as would satisfy the statute of frauds, deposited with the deed. This was held necessary in the case cited, and that view is decisive here.

There was plainly no error prejudicial to the plaintiff in the conclusions of the court, and the judgment must be affirmed.

By the Court.—It is so ordered.

A motion for a rehearing was denied November 27, 1908.

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STUART, Trustee, Respondent, vs. FARMERS BANK OF CUBA CITY, Appellant.

September 11—November 27, 1908.

Trial: Instructions to jury: Bankruptcy: Preferential payments: Fraudulent conveyances: Suspicion: Courts: Federal decisions: Stare decisis.

1. In an action by a trustee in bankruptcy to recover a payment made to a creditor of the bankrupt, alleged to have been made as a preference, the court instructed the jury that the words "'reasonable cause to believe that it was intended to enable the [creditor] bank to obtain a greater percentage of its debts than other creditors would be able to obtain' does not mean reasonable cause to suspect such intention. It is not enough that the creditor had some cause to suspect that his debtor did not have sufficient property left to pay an equal percentage to other creditors of the same class, but he must have such knowledge of facts as to induce a reasonable belief thereof, *or of circumstances to put him on inquiry*, in order to find that the creditor had reasonable cause to believe that a preference was intended." *Held* erroneous, since the jury were thereby warranted in finding against the defendant bank, although it did not have reasonable cause to believe in the bankrupt's intent to give a preference.
2. Under the federal bankruptcy act it is only when the facts known to the creditor are such as would induce a present belief in the ordinarily prudent and intelligent business man that his debtor is insolvent and intends a preference that the creditor is prohibited from collecting or securing his debt or a part thereof.
3. That state of mind which in a reasonable man would lead to inquiry is called mere "suspicion," and as regards notice of fraudulent intent under which conveyances by a debtor to a creditor with intent to defraud are held void, the burden the state law has placed upon the freedom of doing business, that if a reasonably prudent man would be moved to inquiry, and inquiry would disclose facts leading to a belief, that is sufficient, is for the protection of creditors against actual fraud.
4. Apart from some statutes in case of assignments, there is nothing in state policy, nor in the policy of the common law, to prevent a debtor from honestly paying one creditor to the exclusion of others, although knowing and intending that thereby he would give a preference.

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5. The construction of the federal bankruptcy act finally rests with the federal courts and at last with the supreme court of the United States, and in case of no difference of opinion among those courts, or if the supreme court has finally spoken on that subject, the state court should be guided by such utterance, otherwise it is the duty of the state court to decide for itself.
6. When the state court upon full consideration has decided for itself the proper construction of the federal bankruptcy act, the rule of *stare decisis* would seem to require adherence to that decision, especially where the view thus established is supported by the later utterance of the federal supreme court.

TIMLIN and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

One Ralph B. Luckey was on the 5th day of February, 1907, adjudged bankrupt upon an involuntary petition filed January 18, 1907. For years he had been a general merchant at Cuba City, doing his banking business with the defendant, and for some time had also been treasurer of the school district. Early in 1895 Luckey was indebted to the bank in the sum of about $4,000. He also was in arrears to the school district, having shortly before received $10,000 of school district money, deposited the same in his general bank account, and so checked against that account that only some $4,000 remained to his credit therein. The cashier of the bank was one of the sureties on his bond and became disturbed at the condition, and urged that he at least make good the school moneys. After some negotiation the two sureties upon his school treasurer bond and the two other members of the board undertook to sign notes for $7,750, which, with the moneys to his credit at the bank, would make good that fund. It is claimed by the defendant that the bank refused to lend this $7,750 to Luckey, but merely consented to loan it to the persons who signed the note. The loan was in fact made, however, on the note of the parties other than Luckey and the money placed to the credit of the school district in the name of Luckey as treasurer. At the same time his own

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notes for $4,000 to the bank were taken up, thereby discharging certain indorsers, and his new notes to the amount of $4,000 given in lieu thereof, which were secured by a written guaranty of the same persons who signed the $7,750 notes. A transfer from his general bank account to the bank account of the school district was made so as to make that account equal the school moneys in his hands. He continued to do business, paying in one way and another nearly $4,000, which were applied upon the $7,750 notes, until October or November, 1906, when the bank, and perhaps his sureties, became impatient, the indebtedness not having been reduced as promised. After considerable urgency, and efforts on his part to reduce his stock and make payments, he finally, early in November, sold out his business at the full amount of the inventory of the stock and nearly $1,000 bonus. At that time $1,000 was paid by the purchasers and placed by him in his general bank account. The balance was to be paid when the inventory of the stock was to be completed. This was accomplished December 5, 1906, at which time he received checks for $7,300 from those purchasers, which he handed to the bank officers for application upon the claims which the bank held. The officers of the bank credited this $7,300 into his general account, already containing $600 or $700, and then made applications by debit charges against that account sufficient to satisfy all his notes, and delivered up his notes, including the $7,500 note not signed by him. How far such applications were authorized by him so as to constitute voluntary payments was a matter of contention between the parties. After the trustee in bankruptcy had been appointed, suit was brought in the circuit court for Dane county (venue being afterwards changed to La Crosse county) to recover the amounts of such payments from the defendant bank as unlawful preferences under the bankruptcy law. Upon the trial the parties stipulated that the court might find that Luckey was in-

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solvent December 5, 1906, as a part of the special verdict, and that the payments by Luckey would enable such bank to obtain a greater percentage of its debts and claims than would be obtained by other creditors having claims of the same class, and that, after special verdict had been returned, the court should find the amount paid by Luckey to the bank in December, 1906, and a finding of Luckey's intent in making the payments in case he should determine it to be necessary, and also to find whether the sums of money received by the bank were offsets or not. Thereupon the court submitted two questions to the jury: *First.* Were the loans of April 11, 1905, made by the defendant bank, of $7,750, loans to Ralph B. Luckey? Answered "Yes." *Second.* Did the bank officers on December 5, 1906, have reasonable cause to believe that by the payments made by Luckey to said bank on said day it was intended thereby to give the bank a preference? Answered "Yes." No findings were made by the court, but, after due motions to raise all questions present on this appeal, judgment was entered in favor of the plaintiff for $7,915.12, with interest thereon from the commencement of the suit, from which judgment defendant appeals.

For the appellant there was a brief by *S. E. Smalley* and *Morris, Riley & Dudgeon,* attorneys, and *Olin & Butler,* of counsel, and oral argument by *Mr. H. L. Butler, Mr. M. H. Dudgeon,* and *Mr. Smalley.*

For the respondent there was a brief by *Richmond, Jackman & Swansen,* attorneys, and *Lacy, Brown & Lacy,* of counsel, and oral argument by *S. T. Swansen.* They contended, *inter alia,* that the instruction quoted in the opinion was largely taken from *Jackman v. Eau Claire Nat. Bank,* 125 Wis. 465, which case was afterwards affirmed by the supreme court of the United States (*Eau Claire Nat. Bank v. Jackman,* 204 U. S. 522), and cited as other authorities supporting the instruction, *Hargreaves Bros. v. Hackney,* 74 Neb. 700, 104 N. W. 855, 856; *Capital Nat. Bank v. Wilk-*

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erson, 36 Ind. App. 467, 473, 75 N. E. 837, 839; *Parker v. Black,* 143 Fed. 560, 562, 151 Fed. 18; *In re Hines,* 144 Fed. 543, 545, 546; *Sundheim v. Ridge Ave. Bank,* 138 Fed. 951; *Wetstein v. Franciscus,* 133 Fed. 900; *In re Andrews,* 135 Fed. 599; *Crittenden v. Barton,* 59 App. Div. 555, 5 Am. Bankr. Rep. 775, 777; *In re Virginia H. Mfg. Co.* 139 Fed. 209; *In re Pease,* 129 Fed. 446, 448, 450, 451; *Houck v. Christy,* 152 Fed. 612; *Walbrun v. Babbitt,* 16 Wall. 577, 21 L. Ed. 489; *In re Knopf,* 146 Fed. 109; *Coder v. McPherson,* 152 Fed. 951, 952; *Roberts v. Johnson,* 151 Fed. 567; *Western T. & T. Co. v. Brown,* 129 Fed. 728, 730; *Stevens v. Oscar Holway Co.* 156 Fed. 90, 19 Am. Bankr. Rep. 399, 403; *In re Lynden M. Co.* 156 Fed. 713, 714; *In re McMurtrey,* 142 Fed. 853, 856; *Pittsburgh P. G. Co. v. Edwards,* 148 Fed. 377; *Hardy v. Gray,* 144 Fed. 922, 931; *Wright v. Sampter,* 152 Fed. 196, 198; *In re Coffey,* 19 Am. Bankr. Rep. 148, 165; *John Naylon & Co. v. Christiansen H. Mfg. Co.* 158 Fed. 290, 293; *In re W. W. Mills Co.* 162 Fed. 47.

The following opinion was filed September 29, 1908:

Dodge, J. This case, as presented by the record, is involved in much confusion. Certain issues of fact were submitted to the jury and other controverted issues were withheld from it, some of them by consent of counsel that the court might find upon them, and others apparently without any consent at all of the attorneys. The issues other than those which were submitted to the jury were: *First.* Was Luckey insolvent? *Second.* Did the defendant have reasonable cause to believe so? *Third.* Did the transaction between the bankrupt and the defendant at the time of the alleged payment constitute a payment or transfer by the bankrupt, or merely an exercise by the creditor of its right *in invitum* to apply its indebtedness on open account to him upon his debts to it? This question was severable in its applica-

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tion to the whole transaction and also to several individual items of so-called payment. *Fourth.* Was the defendant the real party benefited by the payment, or the so-called sureties? On all these questions there was at least claimed to be some evidence in favor of the defendant's contentions; on some of them, that it clearly preponderated in defendant's favor. There is no indication in the record that any tribunal has passed upon these questions of fact specifically, unless we indulge in the presumption, because they were so plainly in issue, that the court must be deemed to have passed upon them in rendering judgment against the defendant. In view, however, of the conclusion we have reached upon one of the assignments of error, which conclusion must necessitate a new trial, we forbear to express our opinion whether the evidence is sufficient to support either the verdict of the jury upon the two questions submitted to them or the apparent conclusion of the court upon the questions of fact not so submitted.

Error is assigned upon the instruction under which the second question of the special verdict was submitted to the jury. A material and illustrative part of that instruction was as follows:

"The jury are instructed that the words 'reasonable cause to believe that it was intended to enable the bank to obtain a greater percentage of its debts than other creditors would be able to obtain' does not mean reasonable cause to suspect such intention. It is not enough that the creditor had some cause to suspect that his debtor did not have sufficient property left to pay an equal percentage to other creditors of the same class, but he must have such knowledge of facts as to induce a reasonable belief thereof, *or of circumstances to put him upon inquiry,* in order to find that the creditor had reasonable cause to believe that a preference was intended."

It is contended that the last portion of this instruction is erroneous; that only when the facts known to the creditor are such as would induce a present belief in the ordinarily

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prudent and intelligent business man that his debtor is insolvent and intends a preference is he prohibited by the bankruptcy act from collecting or securing his debt or a part thereof. The court has obviously by these words, and others to similar effect elsewhere in the charge, instructed the jury that although the facts that the creditor then knows may not be sufficient to induce that belief, yet, if a reasonably prudent man would be put upon inquiry thereby, and if upon such inquiry he might learn other facts, then he is chargeable with notice of the insolvency and intent to prefer, if such facts, which he did not know but upon inquiry would be likely to ascertain, would warrant such belief. There is considerable variance in expressions of courts upon this subject. The supreme court of the United States has in several cases declared that the reasonable ground of belief intended by the bankruptcy act is the present knowledge of the creditor; that he may safely act upon what he knows, and that, if the reasonably prudent and intelligent man would not be led to a belief of insolvency or preferential intent by such facts, it is not the purpose of the bankruptcy act to prevent collection or securement of debts in the ordinary course of business; and there are many decisions to like effect by other courts. *Merchants' Nat. Bank v. Cook,* 95 U. S. 342, 346; *Grant v. Nat. Bank,* 97 U. S. 80, 82; *Barbour v. Priest,* 103 U. S. 293, 297; *Stucky v. Masonic Sav. Bank,* 108 U. S. 74, 2 Sup. Ct. 219; *In re Goodhile,* 130 Fed. 471, 12 Am. Bankr. Rep. 374; *Sundheim v. Ridge Ave. Bank,* 138 Fed. 951, 15 Am. Bankr. Rep. 132; *In re Hines,* 144 Fed. 543, 16 Am. Bankr. Rep. 495, 497; *May v. Le Claire,* 18 Fed. 164; *Blankenbaker v. Charleston State Bank,* 111 Ill. App. 393. On the other hand we find in the utterances of several of the inferior federal courts, and of some of the state courts, appended to this doctrine the further rule that if a reasonably prudent man would be moved to inquiry, and inquiry would disclose facts leading to a belief, that is suf-

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ficient. *In re Eggert,* 98 Fed. 843; *In re Virginia H. Mfg. Co.* 139 Fed. 209, 15 Am. Bankr. Rep. 135; *Wright v. Sampter,* 152 Fed. 196, 18 Am. Bankr. Rep. 355; *In re Coffey,* 19 Am. Bankr. Rep. 149; *Bardes v. First Nat. Bank,* 122 Iowa, 443, 98 N. W. 284. Whether such courts have always recognized the distinction between the two ideas or considered that they were only defining and making more clear the rule of the supreme court, we are unable to say. But we think it clear upon any careful analysis of the ideas expressed that these cases import an additional serious burden upon ordinary transactions in the collection of debts within the four months preceding bankruptcy and while the debtor is in the ordinary course of business. The latter rule as laid down is substantially the rule of Wisconsin in regard to notice of fraudulent intent under which conveyances by a debtor to a creditor with intent to defraud creditors are held void. *Rindskopf v. Myers,* 87 Wis. 80, 57 N. W. 967. That state of mind which in a reasonable man would lead to inquiry is called mere "suspicion." This burden the state law has placed upon the freedom of doing business for the protection of creditors against actual fraud; but, apart from some statutes in case of assignments, there is nothing in state policy, nor indeed in the policy of the common law, to prevent a debtor from honestly paying one creditor to the exclusion of others, although knowing and intending that thereby he will gain preference. *Bleiler v. Moore,* 94 Wis. 385, 69 N. W. 164; *Shepard v. Ostertag,* 106 Wis. 82, 81 N. W. 1103. The bankruptcy act has added a new and very serious limitation upon the freedom of business intercourse. An act, however much in the ordinary course of business, by which a merchant pays a debt is liable to be reviewed and rescinded if it happen that within four months thereafter the debtor becomes bankrupt. It is therefore entirely reasonable that a less stringent rule of caution be required in the mere reception of payment or

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security by a creditor simply because it ultimately results in preferring him than in the case of a transfer to him, whether by payment or otherwise, which is made with the actual intent to defraud other creditors. The distinction between the first rule above stated, namely, that of a reasonable belief deducible from the facts then within the knowledge of the creditor, and the second rule, namely, his chargeability with facts which he might on inquiry ascertain, was carefully considered in the recent case in this court of *Suffel v. McCartney Nat. Bank,* 127 Wis. 208, 106 N. W. 837. There the circuit court had expressly found that the facts known by the creditor at the time of the payment were not of themselves reasonable cause to believe in insolvency or preferential intent; but that if the rule applicable to fraud cases in our own court were to be applied, they were such "as would naturally produce in the mind of a reasonably intelligent man a doubt or suspicion of the solvency, and were such as would put a reasonably prudent man upon inquiry." Upon this state of facts the circuit court, relying upon the above cases in the supreme court of the United States, held that the payment did not constitute an illegal preference. That case was most carefully considered in this court after able argument, where was brought to our attention the case of *In re Eggert,* 102 Fed. 735, and the approving case of *Jackman v. Eau Claire Nat. Bank,* 125 Wis. 465, 104 N. W. 98, which is one of the cases asserting the duty of inquiry to be upon the creditor, and the rule applied by the circuit court was approved. The *Eggert Case* was referred to at the end of the opinion with no further comment thereon upon this subject, but, obviously, by the decision reached the rule of that case embodied in the last two lines of the portion quoted, requiring inquiry, was rejected. The *Jackman Case* was affirmed by the supreme court of the United States, but the particular question in hand was in no wise considered. 204 U. S. 522, 27 Sup. Ct. 391

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Of course the construction of the bankruptcy act finally rests with the federal courts and at last with the supreme court of the United States. If there were no difference of opinion among those courts, or indeed if the supreme court had finally spoken on that subject, we should of course be guided by such utterance. But where variant views are entertained it is the duty of this court to decide for itself. When it has done so once upon full consideration, at least the rule of *stare decisis* would suggest the duty and certainly the advisability of adhering to the rule laid down. Especially does that course seem proper in the present instance, where the view established in the *Suffel Case* is supported by the later utterance of the federal supreme court. We think the law must be held settled in accordance with that case, and that the instruction given in the case at bar warranted the jury in finding against the defendant, although it did not have the reasonable cause to believe in the bankrupt's intent to give a preference as those words must be construed. Thereby error, obviously prejudicial, was committed.

By the Court.—Judgment reversed, and cause remanded for new trial.

TIMLIN, J. (*dissenting*). "If a bankrupt shall have given a preference within four months . . . and the person receiving it or to be benefited thereby . . . shall have had reasonable cause to believe that it was intended thereby to give a preference it shall be voidable by the trustee, and he may recover," etc. Subd. *b*, sec. 60, Bankr. Act July 1, 1898 (ch. 541, 30 U. S. Stats. at Large, 562, U. S. Comp. Stats. 1901, p. 3445). The trial court in its instructions to the jury construed this statute with reference to its words and with reference to pre-existing rules of law to mean that neither suspicion that a preference was intended, or doubt on this point, was sufficient to create liability; that the party

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sought to be charged must have had reasonable cause to believe that a preference was intended, but this reasonable cause to believe might be inferred from facts which came to the knowledge of such party and which were sufficient to put him upon inquiry, which, if made, would result in knowledge. It will thus be seen that a federal question is presented, the trustee claiming the right to recover upon the bankruptcy act so construed, which right is denied by the reversal of the judgment of the court below, and it will be further seen that the whole controversy turns upon whether or not the ultimate fact of reasonable cause to believe that it was intended to give a preference can be proven by the old and well-settled mode of proving the larger concept of actual knowledge or the equal concept of notice. This mode of proof and its effect was recognized in *Oliver v. Piatt,* 3 How. 333, 410; *Wollensak v. Reiher,* 115 U. S. 96, 5 Sup. Ct. 1137; *McClure v. Oxford,* 94 U. S. 429, 432; *The Lulu,* 10 Wall. 192, 201; *Angle v. N. W. Mut. L. Ins. Co.* 92 U. S. 330, and other similar cases, none of them involving the construction of this statute, but all cases where one was sought to be charged, not merely with having reasonable cause to believe, but with having actual knowledge or with having notice.

Furthermore, it is a rule of construction of statutes that, "in all doubtful matters and when the statute is in general terms, it is subject to the principles of the common law. It is to receive such a construction as is agreeable to that law in cases of the same nature." 2 Lewis' Suth. Stat. Constr. (2d ed.) § 455, and cases. The words "common law" in this respect do not mean the English common law, or common law as distinguished from equity jurisprudence, but the general case law of the forum. "Equality is equity" is also a maxim having some weight in the construction of this statute. Next, this statute has never been construed by the supreme court of the United States as understood in the ma-

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jority opinion. The cases of *Merchants' Nat. Bank v. Cook,* 95 U. S. 342; *Grant v. Nat. Bank,* 97 U. S. 80; *Barbour v. Priest,* 103 U. S. 293; and *Stucky v. Masonic Sav. Bank,* 108 U. S. 74, 2 Sup. Ct. 219, deal with a different question and with a different statute. In none of these cases was it considered or decided what evidence was proper or sufficient to make a case against one as "having reasonable cause to believe such person insolvent." It is firmly established that mere doubt or suspicion does not constitute such reasonable cause; but as I read the cases it is nowhere decided that reasonable cause to believe one insolvent could not be established by proof that the party to be charged had brought home to him knowledge of facts and circumstances sufficient to put him on inquiry, but unreasonably refrained from inquiry. Besides, reasonable cause to believe that a person is insolvent is a different proposition from reasonable cause to believe that it was intended thereby to give a preference. The former is reasonable cause to believe in the existence of a condition of inadequacy of assets or inability to pay. The latter is reasonable cause to believe in the existence of a mental condition. The latter could only be established by inference from facts and circumstances, except, perhaps, in those impossible cases where the payer would make express confession of his mental condition. The only case that I know of that has reached the supreme court of the United States involving the construction of the identical statute here under consideration is *Eau Claire Nat. Bank v. Jackman,* 204 U. S. 522, 27 Sup. Ct. 391. In the decision of that case in this court, reported in 125 Wis. 465, 104 N. W. 98, this court said:

"Whether defendant had reasonable cause to believe that Young was insolvent within the meaning of the bankrupt act was a question of fact, and it was chargeable with notice of such fact as reasonable inquiry in view of the circumstances with respect to the debtor's condition, which were brought home to it, might fairly be expected to disclose."

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The supreme court of the United States in affirming this judgment did not expressly notice the matter covered by the foregoing quotation, but it was passed in silence, and neither this court nor the eminent counsel engaged, nor the supreme court of the United States, seem to think it subject to criticism.

I see nothing in the case of *Suffel v. McCartney Nat. Bank,* 127 Wis. 208, 106 N. W. 837, in conflict with this view. In the last-mentioned case the situation presented by the findings of the court below was first an absolute negation of the condition of liability mentioned in that section of the bankruptcy act in question; second, an additional finding that there was evidence which might naturally produce, not belief, but a doubt or suspicion, and that doubt or suspicion was such that under the rule of law applicable to fraudulent grantees it would put a reasonably prudent man upon inquiry. The utmost, then, that the case presented to this court was a condition in which it was settled by the findings of the court below that there was evidence in the case of facts which would or might have put an ordinary, reasonable person upon inquiry; but notwithstanding this, the person sought to be charged did not have reasonable cause to believe that it was intended to give a preference. These two findings are not inconsistent. The conclusion arrived at in the majority opinion assumes that they are always inconsistent and antagonistic. Still I think it quite obvious that in all that large class of cases, of which this is one, where evidence of facts sufficient to suggest inquiry is only an item of evidence, tentative and rebuttable as regards the final inquiry, it may be and frequently is true that, although the jury may from proof of facts sufficient to suggest inquiry infer a reasonable cause to believe that a preference was intended, still they are not bound to do so, but may find, notwithstanding such evidence, from other evidential facts and circumstances that there was no such reasonable cause to believe. The whole subject is very thoroughly and learnedly

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discussed in 2 Pom. Eq. Jur. (3d ed.) §§ 597, 598 *et seq.* How can we consider these subsidiary and recognized modes of proving notice or knowledge of the intentions or of the rights of another abrogated by a statute of the United States in the form quoted? The very nature of the inquiry necessary under the bankruptcy statute in this particular brings us within those rules. They are the result of wisdom and experience, and were established to facilitate just such investigations. Bankruptcy cases in which this mode of proof was recognized as proper: *In re Eggert,* 102 Fed. 735, 43 C. C. A. 1; *Allen v. McMannes,* 156 Fed. 615; *Thomas v. Adelman,* 136 Fed. 973; *Dokken v. Page,* 147 Fed. 438, 77 C. C. A. 674.

To reiterate: Well-established rules permit knowledge or notice of the right of another or of the intention of another to be inferred as matter of fact in most instances, but as a legal conclusion in some few instances from evidence that the party sought to be charged had knowledge of such facts and circumstances as would put a reasonably prudent person upon inquiry. The majority opinion holds that a proper construction of the bankruptcy act forbids such mode of proving the cognate fact that one had reasonable cause to believe a preference was intended, and for this reason reverses the judgment of the court below. I consider this construction of the bankruptcy act erroneous, and see nothing in the act itself or in the federal decisions to warrant it. The excerpt from the charge of the court below quoted in the majority opinion is rather incomplete, but, taking the whole charge of the court below, it is in substantial conformity with these rules of evidence, hence the judgment of the court below should be affirmed.

KERWIN, J. I concur in the foregoing opinion of Mr. Justice TIMLIN.

A motion for a rehearing was denied November 27, 1908.

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STATE EX REL. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent, vs. RAILROAD COMMISSION OF WISCONSIN, Appellant.

September 12—November 27, 1908.

Statutes: Construction: Legislative intent: Judicial construction: Constitutional law: Public-service corporations: "Authority" of Railroad Commission: Delegation of authority: Regulation of corporations: Railroads: Amendment of articles of incorporation: Capital stock: Publication and filing of amendments: Increase of capital stock: Fees: Powers of Railroad Commission.

1. The legislative intent in passing a law governs as to the scope thereof whether such intent is unambiguously expressed or is discoverable by the aid of rules for judicial construction.
2. The rules for judicial construction permit of looking at a legislative enactment as a whole, to the subject with which it deals, to its reason and spirit, of giving words a broad or narrow construction, going either way to the limits of their reasonable scope, of supplying omitted words clearly in place by implication, of changing one word for another in case of the wrong one being clearly used, and of thus reading out of the enactment and giving effect to the real intent though it may be found to be contrary to the letter thereof.
3. For the purpose of clearing up obscurities in a legislative act it should be read with reference to the leading idea thereof, that being regarded as such limitation upon particular words or clauses and expansion of others, within the scope thereof, in connection with that of words clearly implied, and the law be thus, if reasonably practicable, brought into harmony with such idea.
4. The leading idea of sec. 1753—3, Stats. (Laws of 1907, ch. 576), is that a public-service corporation shall not do any of the things conditionally prohibited except upon the authority of the Commission first obtained; the word "authority" not being used as suggestive of a delegation of power to determine what the corporation may do within its corporate powers, but of authority to determine whether the thing proposed to be done is within such powers.
5. The legislature cannot properly delegate authority to a commission to determine what power a corporation shall possess. It may clothe a commission with authority to determine whether

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the facts exist rendering the corporation competent to exercise its corporate powers in a given case.

6. A legislative grant of authority to a commission to determine whether a corporation may do a particular thing proposed by the latter to be done implies authority to determine corporate competency in that regard tested by the charter.

7. Sec. 1774, Stats. (1898), relative to amending articles of incorporation, refers only to corporations organized under ch. 86, Stats. (1898), which excludes railroad corporations.

8. A change of the authorized capital stock of a railway corporation is one of a fundamental character requiring an amendment to the articles of organization.

9. Such a change under sec. 1826, Stats. (1898), though not called an amendment, when effected is one in fact.

10. When by the policy of the written law the articles of organization of a corporation are required to be made a matter of public record and there is no express provision for making an amendment to such articles a like matter, by necessary implication such amendment, to be valid, must substantially follow, as regards publicity, the course of the original articles.

11. Notwithstanding the written law makes no express provision for making a change in the fundamentals of a corporation a matter of public record, the provision in sec. 1820, Stats. (1898), to the effect that such a corporation shall pay a prescribed fee for filing amendments to its articles of organization, recognizes that such filing is essential to the validity of such an amendment, and in view of the unwritten law in respect to the matter is equivalent to a legislative declaration in harmony therewith.

12. The Railroad Commission of this state has authority under sec. 1753—3, Stats. (Laws of 1907, ch. 576), to pass upon the competency of a railroad corporation to increase its capital stock and to refuse permission in that regard in case the articles of incorporation shall not have been so broadened as to cover the subject by a valid amendment which requires a public record of the change to be made in the office of the secretary of state and compliance with the conditions precedent thereto in respect to the payment of fees.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Mandamus proceedings to require the State Railroad Commission to furnish the relator with a certificate of authority to issue stock in addition to that originally authorized in its

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articles of organization. The Commission refused to furnish such certificate because the relator had not filed the amendment to its articles of organization increasing its capital stock with the secretary of state. The relation showed facts essential to favorable action upon its request for the certificate unless filing of an amendment to its articles of organization increasing its capital stock was necessary. There was a motion to quash the alternative writ, which was denied upon the ground that the relator's petition showed that it was entitled to the certificate demanded because a railroad corporation, in order to increase its authorized capital stock, is not required to file an amendment to its articles of organization covering the subject or evidence thereof, with the secretary of state. The appeal is from the order overruling the motion to quash.

For the appellant there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

For the respondent there was a brief by *John B. Sanborn,* and oral argument by *Mr. Sanborn* and *Mr. A. H. Bright.*

The following opinion was filed September 29, 1908:

MARSHALL, J. This appeal involves questions of much importance to corporate and general interests, viz.: What is the scope of the Railroad Commission's power relative to the issue of stock, stock certificates, bonds, or other evidences of indebtedness by railroad corporations, and is such a corporation, like corporations in general, required, as a condition precedent to increasing its capital stock originally provided for, to amend its articles of organization and to that end file a properly authenticated copy of the amendment with the secretary of state and pay $1 for each $1,000 of the increase as a fee for such filing? It would seem that matters of such great moment ought to be readily determinable by the plain, unmistakable letter of the written law instead of being in-

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volved, as they seem to be here, in language so ambiguous as to require a reading thereof in the light of rules for judicial construction, not called into activity except in cases of necessity, in order to enable one to see sufficient sense in the enactment to indicate satisfactorily the legislative purpose and determine that such purpose is sufficiently expressed to warrant effective recognition thereof.

The first question suggested is raised by counsel for respondent challenging the jurisdiction of the Commission to determine any question of fact as regards the legal capacity of a railroad corporation to issue new stock and permit or refuse to permit such issue according to whether the status disclosed satisfies statutory requirements. That turns on the meaning of this language in sec. 1753—3, Stats. (pp. 411, 412, ch. 576, Laws of 1907):

"No public-service corporation shall hereafter issue any stock, stock certificates, bonds or any other evidences of indebtedness payable in more than one year from date, until it shall have first obtained authority for such issue from the Railroad Commission as herein provided. The proceedings for obtaining a certificate of such authority from said Commission and the conditions of its being granted by said Commission shall be as follows:

"(a) In case the stocks, certificates of stock, bonds or other evidences of indebtedness are to be issued for money only the corporation shall file with the Commission a statement, signed and verified by its president and secretary, setting forth (1) the amount and character of the proposed stocks, certificates of stock, bonds or other evidences of indebtedness, (2) the purposes for which they are to be issued, (3) the terms on which they are to be issued, and (4) the total assets and liabilities of the corporation in such detail as the Commission may require. The Commission may also require the corporation to furnish any further statements of fact or evidence that it may deem pertinent to the inquiry. The Commission shall thereupon issue to the corporation a certificate stating the amount, character, purposes and terms on which such stocks, certificates of stock, bonds, or other evidences of indebtedness are proposed to be issued."

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That the quoted language is ambiguous and so a subject for judicial construction does not admit of reasonable controversy. It is ambiguous in its literal sense, in that a corporation as a condition precedent to the right to issue new stock is required to "have first obtained authority for such issue from the Railroad Commission," to be evidenced by "a certificate of authority from such Commission" and by specified proceedings and upon specified conditions, yet no such certificate in terms is required to be issued but only one "stating the amount, character, purposes and terms on which the stock," etc., is proposed to be issued. No conditions are in terms expressed except that there shall be placed before the Commission certain specified evidence and such other "statements of fact or evidence" as the Commission "may deem pertinent to the inquiry."

It will be seen that the literal sense of the law might be complied with as regards every duty on the part of the corporation precedent to that of the Commission to furnish the certificate, without a disclosure showing legal capacity to issue new stock and even though it might show incapacity in that regard. Taking the law literally, compliance with the special requirement, if any, made by the Commission, is not a condition precedent to the issuance of the certificate. The requirement being brought to the notice of the Commission, "thereupon," in the words of the law, it shall "issue . . . a certificate," etc. Not, as before indicated, in terms of authority, but merely as to certain facts disclosed regardless of whether they show legal capacity to do the proposed thing. Yet such certificate is spoken of as one of authority, designed, it would seem, to show, *prima facie* at least, validity of the proposed act upon which purchasers may rely in investing and the public may rely in submitting to the burdens necessary to compensate for the use of the investment and maintain it at its representative value. Such an outcome of the legislation would be so manifestly absurd

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and out of harmony with modern thought as to legislative regulation of corporate affairs, as to conclusively indicate that some different result was intended by the lawmaking power, which it either failed to express at all or left obscured by the omission of words to be implied or the use of words in a sense far different from their natural, ordinary meaning, or both. It is the office of judicial construction to supply such omitted words and discover and give effect to such sense, if it can be found within the reasonable scope of the language, express and implied, used by the legislature, and to declare the law to be according to the intent so indicated.

The actual judicially determined legislative intent must always govern if expressed at all so as to be discernible by the searchlights which the court possesses. They permit of looking at a written law as a whole, to the subject with which it deals, to the reason and spirit thereof, to give words a broad or narrow construction, going either way to the limits of their reasonable scope, to supply omitted words which are clearly in place by implication, to change one word for another in case of the wrong one being clearly used, and so read out of the enactment the real intent, even though it may be contrary to the letter thereof. *Nichols v. Halliday,* 27 Wis. 406; *Haentze v. Howe,* 28 Wis. 293; *Harrington v. Smith,* 28 Wis. 43; *Palms v. Shawano Co.* 61 Wis. 211, 21 N. W. 77; *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 74 N. W. 544; *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 659, 79 N. W. 422; *State v. Railway Cos.* 128 Wis. 449, 479, 108 N. W. 594; *Pape v. Carlton,* 130 Wis. 123, 109 N. W. 968.

One of the most familiar and safe canons of construction may be stated thus: For the purpose of clearing up obscurities in a law it should be read with reference to the leading idea thereof,—such idea being regarded as such limitation upon particular words or clauses and expansion of others

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within the scope thereof, in connection with that of words clearly implied,—and be thus, if reasonably practicable, brought into harmony with such idea.

The learned counsel for respondent, recognizing the force of the broad principle stated, insist that the leading idea of the law in question is publicity; that a corporation desiring to do any one of the things, authority for which is required to be obtained from the Railroad Commission, shall fully inform the public in that regard through its representative, the Commission, leaving state and individual interests to invoke such remedy as may be available for any wrongdoing. If the premises were sound the result contended for would not be difficult to reach, but they seem to be manifestly unsound.

Considering the situation the legislature had to deal with, the law must be regarded, unmistakably, as intended to prevent improper issues of corporate stock or securities; as a remedy for a recognized existing evil, to be applied at the very boundary between right and wrong, not a mere means of remedying wrong after its occurrence or of making wrongdoing public and giving it the semblance of right as a compensation for publicity, which would be the result of counsel's contention, if it were adopted.

The key to the law is contained in the declaration, in effect, that no corporate stock, stock certificates, bonds, or any other evidence of indebtedness payable in more than one year from the date thereof shall be issued by any public-service corporation except upon the authority of the Commission first obtained. That, of course, does not imply authority for the Commission to interfere with the mere business policy of a corporation within its corporate powers, which, as suggested by counsel for respondent, would be an illegitimate delegation of authority. *State v. G. N. R. Co.* 100 Minn. 445, 111 N. W. 289. It does, unmistakably, show a purpose to lodge in the Railroad Commission power

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to pass upon questions of fact involved in whether a public-service corporation, desiring to do any of the things mentioned, is competent in that regard, having reference to the written law on the subject. The seat of original power is the legislature. It cannot legitimately delegate it. It can properly clothe a commission with capacity to determine whether corporate rights created by the legislature are exercisable, that depending upon the existence of facts satisfying legal conditions precedent in that regard, and give to the corporation invoking its jurisdiction evidence of its determination. It would be highly unreasonable to conclude that the legislature purposed empowering the Commission to authorize the doing of the things mentioned in the act in any other sense.

The grant of power to authorize suggests by necessary implication the grant of power to pass upon the underlying questions. The former includes the latter. True, the law prescribes how the authority of the Commission shall be obtained, as before indicated, and does not expressly declare that it shall pass upon the general question of legal capacity by finding the facts in that regard, but contemplates an inquiry as broad as the subject matter in hand, to wit: whether the appellant ought to be permitted to do the proposed act.

The language that the Commission may require the corporation to furnish any further statement of fact or evidence that "it may deem pertinent to the inquiry" is very significant and suggestive. What inquiry? Necessarily, it seems, that as to whether the applicant for the permit is competent to do the proposed thing subject to the indorsement of the Commission in that regard, evidenced by what the law characterizes as its "certificate of authority."

While, immediately following the language last quoted, it is said the Commission "shall thereupon issue to the corporation a certificate," etc., not waiting according to the literal sense even for compliance with the requirement as to fur-

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nishing evidence, the only reasonable conclusion which can be arrived at, it seems, is that the power to require production of all evidence "pertinent to the inquiry" implies that the inquiry shall wait upon compliance with the requirement, and that the case made by the corporation in the whole shall satisfy the essentials of competency to receive the permit asked for.

Thus the whole act is made to harmonize with the general purpose, the leading idea, before indicated. It were far better if the act had provided, according to such manifest purpose, that no public-service corporation shall hereafter issue any stock, stock certificates, bonds, or any other evidence of indebtedness payable in more than one year from date until it shall have obtained a certificate of competency from the Railroad Commission. In case of stock, certificates of stock, bonds, or other evidences of indebtedness to be issued for money only, the corporation shall file with the Commission a statement signed and verified by its president and secretary setting forth specifically (as in the law indicated) the facts, and furnish the Commission with such other evidence as it may deem pertinent to the inquiry, showing competency to do the proposed act, whereupon the Commission shall issue thereto its certificate evidencing the same and stating the amount, character, purposes, and terms on which the stock, certificates of stock, bonds, or other evidences of indebtedness are proposed to be issued. The words of the law in question should be restrained or expanded, within reason, and words deemed to be in place clearly impliable, necessary to express that purpose which can be accomplished, in the opinion of the court, without any violence to language and in accordance with familiar rules for judicial construction heretofore indicated.

Passing the question of jurisdiction, which, as seen, is resolved in favor of appellant, we come to the one as to whether a railway corporation, the same as public-service

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corporations generally, in order to increase its capital stock must amend its articles of organization and file an authenticated copy of such amendment with the secretary of state.

It is conceded that under sec. 1772, Stats. (1898), as it originally existed, public-service, including railway corporations, in common with corporations generally, with few exceptions not material here, were made liable to the state, in case of an increase of their capital stock, in a specified sum per thousand dollars of such increase, but discharge of such liability was not made a condition precedent to the increase. The language of the section was this:

"Every corporation organized and doing business under the laws of this state which may hereafter increase its capital stock shall pay as a fee therefor fifty cents for each one thousand dollars of increase," etc.

Payment of the fee had no connection with filing the copy of the amendment to the articles of organization with the secretary of state. The recording of a copy authenticated in a specific manner in the office of the register of deeds where the original articles were recorded, as to all corporations organized under ch. 86, Stats. (1898), effected the change and thus fixed the obligation of the corporation to the state to pay the prescribed fee, the only effect of failure to file a like copy with the secretary of state being liability of the corporation to a penalty of $25. The law was so changed by ch. 507, Laws of 1905, as to corporations organized under such chapter as to make filing of a copy of the amendment with the secretary of state a condition precedent to its validity, and made payment of the fee for increasing the capital stock a condition precedent to such filing. The law as it now stands is worded thus:

"Every . . . corporation [with some exceptions not including public-service corporations] organized and doing business under the laws of this state shall pay . . . for filing an amendment increasing its capital stock . . . in addition to said fee of ten dollars, one dollar for each one thousand dollars of increase." Sec. 1772, Stats. (Supp. 1906).

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The words "every corporation," etc., in the former law, conceded to include railway corporations, is preserved in the revised section, yet it is insisted here, and was successfully in the court below, that they are now excepted because sec. 1826, Stats. (1898), as amended by ch. 461, Laws of 1901, covering the subject of increasing the capital stock of railway corporations, provides that it may be done by a vote of the stockholders, conditioned, however, that "no vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of all of the stockholders voting therefor and the amount of stock owned by each, shall be entered upon the records of such corporation," nothing being said expressly about the corporate action being in the form or nature of an amendment to the articles of incorporation or notice of the change being filed in the office of the secretary of state, except that upon increased stock being issued "a report showing the amount issued and the purposes to which it has been, or is to be, devoted," etc., shall be filed. That is to say, a fee for increase of capital stock of a corporation is now only required for filing an amendment to the articles of organization providing for such increase, and railroad corporations are not required expressly to file any such amendment.

It was conceded on the argument, as we understand, and as seems manifest, that if railway corporations were favored, as counsel for respondent insist, it was by an inadvertence. Such a discrimination would be so highly unreasonable that it would be absurd to claim that any such intent was in the legislative mind. Therefore it must have been supposed by the lawmaking body that such corporations were required by existing laws to amend their articles of organization in order to increase their capital stock, and that in order to effect such an amendment it is necessary to file evidence of the change in the office of the secretary of state where the original articles of organization are filed (sec. 1820, Stats.

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1898); the only place where any public record thereof is required. However, if there be no reasonable basis for such supposition, then the court cannot repair the mistake and, of course, should not and will not make any attempt to that end.

It must be conceded that proceedings effecting an increase of capital stock of a railway corporation, in practical effect, amend the original articles of organization, since one of the significant requirements thereof is that they shall specify "the amount of the capital stock of the corporation, the number of shares of which it shall consist, and if such stock shall consist of common and preferred stock, the number and amount of shares of each class." Sec. 1820, Stats. (1898). An increase of capital stock is a change of fundamental character. 1 Thomp. Comm. on Corp. § 78. But it is insisted it conclusively appears that no other act is essential to complete such an amendment as the one in question except such as are indicated expressly in sec. 1826, Stats. (1898), as amended by ch. 461, Laws of 1901, since that provides that "no vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of all of the stockholders voting therefor and the amount of stock owned by each, shall be entered upon the records of such corporation," and does not provide for filing anything with the secretary of state in advance of an actual issue of new stock. Though standing alone that might be the natural inference, if the law otherwise, by necessary implication, indicates that the articles of organization as amended must be evidenced by a record in the office of the secretary of state, there is no repugnance, since that might be and yet the amendment be made ineffective without the existence of the corporate record which sec. 1826 requires.

Counsel for appellant point to the decision of the federal court in *Fishback v. F. du L. & N. E. R. Co.* 158 Fed. 88, holding that noncompliance with sec. 1774, Stats. (1898), in case of an attempt to amend the articles of or-

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ganization of a railway corporation, is fatal to the proceedings; that such section applies to all corporations. It is sufficient to say the federal court overlooked the fact that the section, by its terms, only applies to corporations organized under ch. 86, Stats. (1898), and that railway corporations are organized under ch. 87.

Our attention is further called to 1 Thomp. Comm. on Corp. § 238; *Day v. Mill-Owners' Mut. F. Ins. Co.* 75 Iowa, 694, 38 N. W. 113; *Altoona Gas Co. v. Gas Co.* 17 Pa. Co. Ct. Rep. 662, and 10 Cyc. 233, to which may be added 7 Thomp. Comm. on Corp. § 8181, and *Anderson v. Railroad Co.* 91 Tenn. 44, 17 S. W. 803, holding or suggesting that in the absence of any requirement for making an amendment to corporate articles a matter of public record its validity must wait upon its being so made where the original articles are filed or recorded. The text in Thompson at sec. 8181 is this:

"If the governing statute requires a charter to be registered in a certain public office, it may fairly be assumed that an amendment to such charter must, to be valid, be so registered."

The cited cases bear out that view.

It is significant that while the statutes require articles of organization of railway corporations, the same as those of others, to be of record in the office of the secretary of state and there are provisions for changing such articles as to fundamentals in several material particulars, no such change is spoken of as an amendment to such articles. According to the theory of counsel for respondent the corporate powers of a railway corporation may be radically changed without any public record being made thereof, so the original articles of record with the secretary of state will not furnish any safe indication of the scope of such powers. That is out of harmony with the entire policy of the law as to publicity regarding corporate charters. A more reasonable theory is

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that the legislature assumed that in order for a corporation to make any change in its corporate powers authorized by the statutes, it must do so by amendment properly adopted and made a matter of record where the original articles are filed.

In sec. 1820, Stats. (1898), language occurs which we regard as an unmistakable legislative recognition of the condition of the unwritten law as above indicated. It provides for filing in the office of the secretary of state of the original articles of incorporation of a railway company as a condition precedent to corporate existence and that "for filing such articles the secretary of state shall collect the fee prescribed in sec. 1772 for filing articles under ch. 86, and if amendments to such first mentioned articles are filed he shall collect the fee fixed by such section for filing amendments thereunder." There was no reason whatever for the language as to amendments unless the legislative idea was that filing the same was essential to their validity. On the whole, we conclude that not only the reasonable but the necessary implication from the statutes is that such filing is essential and that the legislative recognition thereof above indicated has the force of an express declaration.

The result of the foregoing is that the Railroad Commission had jurisdiction to pass upon the competency of the respondent to issue the proposed new stock and rightly decided in the negative. Therefore the order appealed from is wrong and must be reversed.

By the Court.—The order is reversed, and the cause remanded for further proceedings according to law.

A motion for a rehearing was denied November 27, 1908.

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LOVESEE, Plaintiff in error, vs. THE STATE, Defendant in error.

September 14—November 27, 1908.

Criminal law and practice: Review: Writ of error: Amendment: Order denying new trial: Review by writ of error before judgment: Statutes.

1. In a criminal cause the fact that no judgment has been entered is of itself no sufficient ground for refusing to consider a writ of error, for the supreme court has power to amend the writ so as to permit a review of proper orders.
2. The proceedings under sec. 4719, Stats. (1898), whereby the defendant in a criminal cause is given the right to apply for a new trial and on its denial is entitled to have errors alleged to have been committed on the trial and embraced in the application reviewed by writ of error, differ from the course of reviewing a motion for a new trial upon the court's minutes under sec. 4724; hence a motion to set aside a verdict and grant a new trial upon the minutes of the court upon the grounds that the verdict was contrary to law, against the evidence and not supported thereby, and also upon the ground that the verdict was perverse and did not do substantial justice to the defendant, presents no grounds under sec. 4719 for the issuance of a writ of error before judgment to review the order refusing defendant a new trial.

ERROR to review an order of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Dismissed.*

The cause was originally argued September 14, 1908.

For the plaintiff in error there was a brief by *Homer C. Clark* and *J. R. Sturdevant,* and oral argument by *Mr. Clark.*

For the defendant in error there was a brief by the *Attorney General* and *F. T. Tucker,* assistant attorney general, and oral argument by *Mr. Tucker.*

On September 29, 1908, a reargument was ordered on the following question: "There being no final judgment in the trial court, must not the writ of error be dismissed for want of jurisdiction?"

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The cause was reargued October 24, 1908, and the following opinion was filed November 27, 1908:

SIEBECKER, J. The plaintiff in error was tried in circuit court on an information charging him in separate counts with adultery and fornication. He was convicted of adultery. The court denied a motion to set aside the verdict and to grant a new trial upon the minutes of the court upon the grounds that the verdict was contrary to law, against the evidence and not supported thereby, and also upon the ground that the verdict was perverse and did not do substantial justice to the defendant. No judgment was rendered and no stay of proceedings was entered in the trial court.

The writ of error in this case refers in terms to the "rendition of judgment," but in fact no judgment has been rendered, and plaintiff in error seeks to have the case reviewed on exceptions to rulings and directions made in the course of the trial, including the refusal of the court to grant a new trial upon its minutes before the entry of judgment by the trial court.

The fact that no judgment has been entered is of itself no sufficient ground for refusing to consider the writ of error, for the court has power to amend the writ so as to permit a review of proper orders, as was declared in *Ullman v. State,* 122 Wis. 447, 100 N. W. 818. We are led to inquire whether there is any order in this case for a review of which a writ of error will lie.

As stated above, the plaintiff in error assails the rulings and directions of the court which were made in the course of the trial and which have been incorporated in the bill of exceptions and made part of the record. The plaintiff in error contends that the refusal of the court to grant his motion for a new trial upon the minutes of the court on the grounds alleged is a denial of an application for a new trial under sec. 4719, Stats. (1898), and that the denial thereof

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entitles him to have the alleged errors committed on the trial and embraced in such motion reviewed by this court under sec. 4719, Stats. (1898), before his case has gone to judgment in the trial court. The history of sec. 4719, Stats. (1898), and the manifest purpose in amending it after the decision in *Jackson v. State,* 92 Wis. 422, 66 N. W. 393, is fully set forth in the *Ullman Case.* From the context of this section it is obvious that the legislature intended to grant the defendant in a criminal cause the right to apply to the circuit court for a new trial by petition or motion in writing signed by himself or his attorney, and the proceeding provided by this section was evidently intended to permit a defendant in a criminal case to bring to the attention of the trial court, by written petition or motion in the manner prescribed, the grounds upon which he seeks to have his case reviewed. This differs from the course of reviewing a motion for a new trial upon the court's minutes. This intent of the statute is shown by the provisions that the application must specifically embody the grounds for the motion; that it must be filed with the clerk of the court at least twenty days before the time set for hearing, unless a shorter time has been fixed by order of the court; and that affidavits may be used in support of the written petition or motion. All of these provisions are inapplicable to a motion for a new trial upon the minutes of the court. By such a motion exceptions to rulings and directions in the course of the trial may be reviewed, and, if the court denies the relief, then the defendant is entitled to a review of all such rulings and directions by writ of error, under sec. 4724, Stats. (1898). See, also, sec. 2878, Stats. (1898). Writs in such cases, however, do not lie until judgment has been entered by the trial court. *Jackson v. State, supra; State v. Clifford,* 58 Wis. 113, 16 N. W. 25; *State v. Compton,* 84 Wis. 355, 54 N. W. 578. An examination of the case presented to this court shows that the plaintiff in error seeks, under the provisions

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of sec. 4719, Stats. (1898), to have this court review his exceptions to the ruling denying his motion for a new trial upon the minutes of the court as preserved in the record by the bill of exceptions. As we have pointed out, the proceeding provided by this section was not intended to afford a review of such a motion. Consequently no grounds are presented under sec. 4719, Stats. (1898), for the issuance of a writ of error to review the order refusing the defendant a new trial.

Since the action has not gone to judgment, it follows that the writ of this court was prematurely issued, and it must be dismissed.

By the Court.—It is so ordered.

SMITH, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

November 10—November 27, 1908.

Railroads: Personal injuries: Accidents at crossings: Contributory negligence.

In an action for personal injuries sustained at a railroad crossing, it is *held*, under the evidence, that the plaintiff had an opportunity to look and listen while traveling over the fifty-three feet which intervened between the point where he stopped, looked, and listened and the nearest rail of the track, and that, although his attention was diverted by the spirited team he was driving, it was not irresistibly diverted, and hence that he was guilty of contributory negligence. WINSLOW, C. J., and SIEBECKER, J., dissent.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.*

Among other references upon the part of the appellant

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were the following: *Hain v. C., M. & St. P. R. Co.* 135 Wis. 303, 116 N. W. 20; *Goldmann v. Milwaukee E. R. & L. Co.* 123 Wis. 168, 101 N. W. 384; *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837; *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 75 N. W. 169.

For the respondent there was a brief by *Tullar & Lockney,* and oral argument by *D. S. Tullar.*

Among other references upon the part of the respondent were the following: *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, 46 N. W. 165; sec. 1809, Stats. (1898); *Roedler v. C., M. & St. P. R. Co.* 129 Wis. 270, 109 N. W. 88; *Gower v. C., M. & St. P. R. Co.* 45 Wis. 182; *Tiborsky v. C., M. & St. P. R. Co.* 124 Wis. 243, 102 N. W. 549; *Holmes v. Fond du Lac,* 42 Wis. 282; *Beggs v. C., W. & M. R. Co.* 75 Wis. 444, 44 N. W. 633; *Ward v. C., St. P., M. & O. R. Co.* 85 Wis. 601, 55 N. W. 771; *Clifford v. M., St. P. & S. S. M. R. Co.* 105 Wis. 618, 81 N. W. 143; *Valin v. M. & N. R. Co.* 82 Wis. 1, 51 N. W. 1084.

TIMLIN, J. The respondent brought this action to recover damages for personal injuries suffered at the crossing of a highway by defendant's railroad, and the following facts appear without dispute: On the 17th day of May, 1906, in the forenoon, respondent, while going home from Menominee Falls, was injured at Haylet's Crossing by means of a collision between his team and appellant's locomotive. At Haylet's Crossing appellant's railroad ran in a northeasterly and southwesterly direction and the highway ran in an easterly and westerly direction. Seven hundred and fifty feet along the railroad track northeast of Haylet's Crossing there was another highway crossing called Zink's Crossing. The highway at Zink's Crossing ran in a northerly and southerly direction and turned west at Haylet's Corner and continued

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west to and beyond Haylet's Crossing. In the highway east of Haylet's Crossing and west of Haylet's Corner there was a bridge over a small stream. From the center of this bridge to the center of the railroad track was seventy-seven feet. The highway at the bridge was somewhat higher than the railroad track. The day was bright but windy. The wind was in the southwest and dust was flying. The traveled track of the highway between the bridge and the railway crossing was about sixteen feet in width and a little down hill, and on each side of this traveled track the land was low and marshy. Any one traveling at that time from Haylet's Corner to Haylet's Crossing had for the entire distance an unobstructed view along the railroad track to Zink's Crossing 750 feet and some distance beyond. Respondent was driving a team of highlifed horses hitched to a light wagon. His wife and child were with him on the same seat and he was sitting on the right-hand side. He passed Zink's Crossing, turned west at Haylet's Corner, and proceeded to the bridge. After reaching the bridge he stopped his horses when the hind wheel of the wagon was about in the center of the bridge. He was then sitting in the wagon about eight feet west of the center of the bridge, and the horses' heads were about ten or twelve feet west of him. The distance from the center of the bridge to the center of the railroad track being seventy-seven feet and the width of the track four feet eight inches, the heads of respondent's horses were about fifty-three feet eight inches from the east rail of the track when respondent started his team from the bridge. He knew the train was due, and he looked both ways and listened for the train before he started from the bridge, but he did not look or listen again until his horses were actually upon the track. He gave all his attention to his team, which was going at the rate of three miles per hour and was dancing. When he stopped on the bridge he looked both ways along the track and listened for an approaching train, but neither saw nor

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heard any, and then started on toward the track, his team going on a good fast walk down the hill and dancing, and after leaving the bridge and until he got to the railroad his attention was directed to the team because they wanted to go.

There is evidence to support a finding that no bell was rung or whistle sounded by the train approaching from the northeast. Just as the horses were about stepping over the first rail plaintiff heard a rattle that sounded like the cars. He looked up and the train was close on him, and he tried to back off the track and shouted to let the engine men know he was there, and at this moment the locomotive struck the horses near the fore part of their bodies, carried them down the track, and threw part of the wagon and the plaintiff against the side of the locomotive, injuring him severely.

It is conceded that there was evidence to support the verdict finding the defendant negligent, and only two questions are raised upon this appeal; the first being whether or not upon the facts above set forth the plaintiff was guilty as matter of law of contributory negligence so that a nonsuit should have been granted or a verdict directed for the defendant; and, second, whether the court erred in refusing to instruct the jury as requested by the defendant.

We are unable to discover any substantial ground of difference helpful to the respondent between this case and the case of *Marshall v. G. B. & W. R. Co.* 125 Wis. 96, 103 N. W. 249, and *Hain v. C., M. & St. P. R. Co.* 135 Wis. 303, 116 N. W. 20. In each of the three cases the railway crossed the highway at an acute angle, the person injured was driving a team toward the crossing, and failed to continue to look and listen up to the time the horses stepped upon the track, having looked and listened some distance back—forty or fifty feet in the *Marshall Case,* four or five rods, that is, sixty-six or eighty-two and one-half feet, in the *Hain Case,* and fifty-three feet in the instant case. The writer and Mr. Justice SIEBECKER dissented in the *Hain*

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Case because we thought that within the rule of *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142, the attention of the plaintiff was irresistibly diverted from the approaching train by the danger signals from the freight train on the passing track headed for the crossing. (See diagram.) When Mrs. Hain was forty feet from the rail and her horses' heads fifteen feet nearer to the rail, the engineer of the freight on the passing track gave a danger signal by two short blasts of the steam whistle, which caused Mrs. Hain to look in his direction and away from the approaching train, whereupon she doubled up the ends of the reins, struck the horses with them once, and then looked west between ten and fourteen feet from the track, but continued to attempt to cross. With one engine headed toward her and giving the danger signal to her right and partly behind her, and another coming from her left and bearing down upon the same crossing under the circumstances there shown, the court said:

"The duty to look and listen is absolute when the opportunity exists; that duty is not excused by mere diversion of attention, as it may be in highway cases, but there must be circumstances for which the traveler is not responsible which so irresistibly force his attention to something else as to deprive him of the opportunity to perform the duty."

Respondent's counsel contends that in the case at bar the attention of the plaintiff was irresistibly diverted from his duty to continue to look and listen after he started up his team and until he reached the track by the fact that his horses were high spirited and, although going on a walk, were prancing, and that plaintiff was driving along a raised causeway fifteen or sixteen feet wide and four feet high, on either side of which was marsh. By comparing this with the facts in the *Hain Case, supra,* it will be seen how insufficient it is to make out a case of irresistible diversion from the duty of continuing to look and listen until he reached the track. This reference to the *Hain Case* is to show by comparison

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how weak the instant case is in this respect compared with the *Hain Case.* The instant case is ruled by the cases hereinafter cited. Counsel relies somewhat on *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, 46 N. W. 165, and upon a discussion of that case found in *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 75 N. W. 169, but the effect of these cases upon the situation must be determined by the later case of *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142. Other cases in this court are: *Goldmann v. Milwaukee E. R. & L. Co.* 123 Wis. 168, 101 N. W. 384; *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 75 N. W. 169.

We do not see how it can be correctly said that the plaintiff had no opportunity to look and listen while traveling over the fifty-three feet of space which intervened between the point where he stopped, looked, and listened, and the nearest rail of the track, and, although his attention was diverted, we cannot say that it was irresistibly diverted. We cannot bend the law to the equities and exigencies of particular cases. Without certainty of rule and uniformity of decision rights and liabilities would rest in judicial discretion rather than in rules of law. If these rules relative to the degree of care required of one approaching a railway crossing are to be changed, it is not for this court, in view of the long line of precedents here established, to make that change. This makes it unnecessary to consider the exceptions to the charge.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the complaint.

WINSLOW, C. J. (*dissenting*). I am unable to agree with the conclusion reached by the court in this case. The evidence is undisputed that the plaintiff stopped his team at the last favorable place to stop, when his horses were fifty-three

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feet from the rail, and looked and listened for the approach of a train and saw and heard none. Up to this point he certainly exercised ordinary care. He then started his team toward the track down a slope on a narrow grade about four feet in height. He testified that the horses, though gentle, were high spirited and were dancing, and *he had* to keep close watch of them; that his attention was directed to the team because they wanted to go sometimes faster than he wanted, and he did not want to go rattlety bang over the track and throw the pigrack out of the wagon.

It is true that this court has laid down the rule that a traveler approaching a railroad track must look and listen at the last opportunity, and to this rule there is only the exception that where the traveler's attention is irresistibly forced to something else he may be excused. *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *Hain v. C., M. & St. P. R. Co.* 135 Wis. 303, 116 N. W. 20. It seems clear to me that the words "irresistibly forced," as here used, cannot have their literal meaning of actual physical compulsion, because the conduct of his team, though they be not beyond control, may be such as to "force" him to give them his exclusive attention, as this court has held. *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, 46 N. W. 165, as explained in *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 75 N. W. 169. The words must therefore have a construction not strictly literal, and it seems to me they cover a case where a reasonably prudent man, after looking and listening at the last favorable point and in close proximity to the track, starts to cross, and the conduct of his team is such that he feels that duty imperatively requires him to give them his sole attention. I think it was a question for the jury to determine whether such was the situation here, and therefore I dissent.

SIEBECKER, J. I concur in the foregoing opinion of WINSLOW, C. J.

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GRATZ, Respondent, vs. PARKER, imp., Appellant.

November 10—November 27, 1908.

Judgments: Involuntary nonsuit: Res adjudicata: *Discovery: Examination of adverse party for purposes of pleading: Affidavit: Requisites.*

1. A judgment rendered in a former action as the result of a motion for a nonsuit, made by the defendant at the close of plaintiff's testimony and before the defendant rested her case or offered any evidence, and rendered because plaintiff was found guilty of contributory negligence, is not a judgment of dismissal on the merits, but a judgment of involuntary nonsuit, and is not a bar to another action brought upon the same grounds.
2. Where a plaintiff proceeds to examine the defendant under sec. 4096, Stats. (1898), for the purpose of framing a complaint, it is not required that plaintiff should set out in the required affidavit facts sufficient to constitute a cause of action.
3. In such case it is not even necessary that the plaintiff should know that a cause of action exists, and the examination may be had even though the affidavit shows affirmatively that the plaintiff does not know.
4. In such case, while it may be customary to state in the affidavit that the facts upon which discovery is sought are not within the knowledge of the plaintiff, such statement is not essential, and its omission does not render the affidavit defective.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an appeal from an order requiring the defendant *Adeline Parker* to submit to an examination as an adverse party under the provisions of sec. 4096, Stats. (1898), in order to enable the plaintiff to frame her complaint. The affidavit setting forth the points upon which discovery was sought recited, among other things, that the action was brought by the plaintiff to recover of the defendants, and each of them, the value of certain goods, wares, and merchandise which were stored by the plaintiff in the house occupied by the defendants, and which were during the month

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of June or July, 1906, removed from the boxes, trunks, etc., in which said goods were packed, and also to recover the value of certain goods contained in a satchel left by the plaintiff in the room occupied by her in the house occupied by the defendants, which goods were removed from said satchel on or about July 1, 1906, and that discovery was sought under said sec. 4096 to enable the plaintiff to plead. Then followed a statement of the points upon which the plaintiff sought to examine the defendant *Adeline Parker*. The appellant procured an order to show cause why the plaintiff should not be restrained from examining her, and also requiring the plaintiff to show cause why, if such examination were permitted, its scope should not be limited. Upon the hearing of said order to show cause the order appealed from was entered, such order requiring the appellant to submit to an examination, but materially limiting the scope of such examination.

The cause was submitted for the appellant on the briefs of *V. H. Tichenor*, and for the respondent on that of *Holt & Coombs*.

Barnes, J. The appellant insists that the order appealed from is erroneous (1) because a former judgment, rendered in an action brought by the same plaintiff against the defendant *Adeline Parker* upon the same cause of action, is *res adjudicata* as to the rights of the parties, and no examination should be permitted; (2) because the affidavit upon which the order for examination was based fails to state facts sufficient to constitute a cause of action; and (3) because the affidavit fails to allege that the facts upon which the testimony of the defendant is sought are not within the personal knowledge of the plaintiff.

1. The judgment rendered in the former action was entered as the result of a motion for a nonsuit, made by the defendant at the close of the plaintiff's testimony and before

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the defendant rested her case or offered any evidence. It was rendered because the trial court was of the opinion that, upon the showing made by the plaintiff, she was guilty of contributory negligence. This was not a judgment of dismissal on the merits, but a judgment of involuntary nonsuit. Such a judgment is not a bar to another action brought upon the same grounds. The decided cases in this court are clear and uniform in so holding. *Gummer v. Omro,* 50 Wis. 247, 6 N. W. 885; *Morgan v. C., M. & St. P. R. Co.* 83 Wis. 348, 351, 53 N. W. 741; *Gates v. Parmly,* 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Kaley v. Van Ostrand,* 134 Wis. 443, 114 N. W. 817. The first case cited is exactly similar to the one under consideration. The form of the judgment appears to have been alike in the two cases, and in each a jury was waived and a trial was had by the court.

2. Sec. 4096, Stats. (1898), provides that the affidavit shall state the general nature and object of the action only. It does not require that facts sufficient to constitute a cause of action shall be set forth therein. It would be just as easy to set forth such facts in the form of a pleading as in the form of an affidavit. If the plaintiff had the necessary facts at hand, so that she could set forth a cause of action in her affidavit, then, under the provisions of the statute referred to, she was not entitled to examine the defendant at all before issue was joined. The very purpose of the examination was to secure information to enable the plaintiff to draft her complaint. It is not even necessary that the plaintiff should know that a cause of action exists. The examination may be had even though the affidavit shows affirmatively that plaintiff does not know. *Richards v. Allis,* 82 Wis. 509, 513, 52 N. W. 593; *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 532, 66 N. W. 695. The cases of *Schultz v. Strauss,* 127 Wis. 325, 106 N. W. 1066; *Madison v. Madison G. & E. Co.* 129 Wis. 249, 260, 108 N. W. 65; and *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900, cited and

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relied upon by appellant, simply hold that, where the affidavit affirmatively shows that no cause of action does or can exist, an examination will not be permitted. The affidavit here certainly does not negative the existence of a cause of action.

3. While it is customary to state, in an affidavit such as the one under consideration, that the facts upon which discovery is sought are not within the knowledge of the plaintiff, still that statute does not require such an averment to be made. The affidavit follows the language of the statute, and this court would not be justified in reading a requirement into it that the legislature has not seen fit to incorporate therein.

By the Court.—The order of the circuit court is affirmed.

JUNG BREWING COMPANY, Appellant, vs. KONRAD and others, Respondents.

November 10—November 27, 1908.

Contracts: Ambiguities: Parol evidence: Sales: Breach: Waiver.

1. A written contract for the purchase of 20,000 bushels of malt provided, in substance, that the price should be fifty-nine cents per bushel delivered free on board cars at Chestnut street station, Milwaukee, to be shipped one car per week beginning in the last week in November; that shipments were to be made in bags or in bulk "as ordered," and that the shipping directions given were "Via C., M. & St. P. R. R.," followed by a line headed with the word "To," which was left unfilled. *Held:*

(1) Taking all of the provisions of the contract together, and in connection with the significant, and apparently deliberate, omission of the place to which shipments were to be made, the contract was uncertain on its face.

(2) In that situation, evidence of the situation and surroundings of the parties as well as their communications, so far as

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such communications threw light upon the situation, were competent to be received in order that the court might read the contract in the same light as the parties did when they made it.

(3) The meaning of the parties and the proper construction of the uncertain terms of the written contract was for the jury.

2. In such case the parol evidence admitted on the trial is *held* to be sufficient to show that shipping orders were to precede shipments.
3. In an action for breach of contract to deliver a quantity of malt, the evidence, stated in the opinion, is *held* to justify a finding that plaintiff, the purchaser, by its acts and conduct had, at the time the seller refused further performance, evinced an intention no longer to be bound by the contract.
4. There may be a breach of an executory contract by deliberate refusal to perform stipulations upon which the obligation of the other party depends, and, when such breach takes place, the other party has a right to treat the contract as wholly terminated and take measures accordingly.
5. In such situation, if the other party does not treat the contract as terminated, but continues to demand performance, he will be held to have kept the contract alive. He cannot treat the repudiation of the contract as a breach and as no breach at the same time.
6. Where, after a buyer had repudiated a contract for the delivery of malt, the seller neither did nor said anything indicating that he expected or demanded performance of the contract, he cannot be said to have treated, or waived his right to treat, the repudiation as a breach.

APPEAL from a judgment of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action for the breach of a contract for the sale and delivery of malt. Defense, breach of the contract by plaintiff. The plaintiff appeals from a judgment dismissing the complaint upon the merits after trial before a jury. The plaintiff owned and operated a brewery in Milwaukee and had some interest in a brewery at Covington, Kentucky, and desired to buy malt for both breweries. The defendants were partners engaged in manufacturing malt at Hartford, Wisconsin. After some preliminary negotiations the following contract was made by the parties upon a printed blank used

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by the defendants in their business, the words in italics being the written part:

"MEMORANDUM OF SALE.

"Date *Nov. 23rd, 1906.*

"Sold to *Jung Brewing Co.*
"P. O. Address, *Milwaukee, Wis.*
"Quantity—*20,000 (twenty thousand) bushels.*
"Quality—*Shall show 69% extract fine gritz, 72% in dry substance, 5% moisture.*
"Price—*59 cents per bushel of 34 pounds, Delivered Milwaukee, 30 days or one cent per bushel off prompt cash.*
"F. O. B. *cars Chestnut Street Station, Milwaukee, Wis.*
"Terms of payment—*Prompt cash* or net from date of bill *thirty days.*
"When to be shipped—*One car per week beginning last week of present month.*
"In Bags or in Bulk? *As ordered.* The bags, when empty, to be bundled and returned to Konrad Bros. & Werner.
"Shipping Directions: *Via C., M. & St. P. R. R.*
"To ———.
"Remarks: *The yield of the malt shall be equal to the above stated yield in all respects, analyzed by Hantke's Brewers' School and Laboratories in Milwaukee, Wis., and shall be well screened.*

"*Konrad Bros. & Werner,*
"Per *Aug. Konrad,* Seller.

"Correct: *Jung Brewing Co.,* Purchaser.
"*F. Stresau, Treas.*"

On November 26th the plaintiff ordered a carload shipped to Milwaukee, and it was shipped on the 28th and paid for within a few days. Another carload was ordered December 24th, and this car was shipped to Milwaukee December 29th and also paid for. On January 8, 1907, the defendants wrote the plaintiff as follows: "You are way behind in ordering shipments of malt on contract, and hope you will try and make up." And on the following day the plaintiff replied, saying: "You can ship another car of malt the first of next week. We would have ordered out more before this, but we

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are badly crowded for room." On January 16th the defendants shipped to Milwaukee a carload in response to this order, which arrived there on the following day. The plaintiff was dissatisfied with the quality of the malt in this third car, and, after unloading and testing it, claimed a reduction in the price on account of its inferior quality. A number of letters were exchanged on the subject and some interviews had, which resulted finally in the allowance by the defendants of a reduction of one cent per bushel and the acceptance of payment for the carload on that basis on February 5th. These three carloads contained in the aggregate 5,751 bushels. No more cars were ordered or shipped and no further correspondence or interviews took place between the parties until March 25th, when the plaintiff mailed a written order for one carload to be delivered at Milwaukee. On the following day the defendants replied, notifying the plaintiff that the contract was canceled "for the reason that you have not complied with the terms of the agreement." The market price of malt steadily advanced after January 1, 1907, and on the 25th day of March had advanced to eighty-five cents per bushel.

A special verdict was demanded, and five questions were submitted to the jury. In reply to the first question the jury found that it was the intention of the parties at the time the contract was made that the plaintiff should first give orders for the shipment of each car before the shipment took place. The second and third questions were only to be answered in case of a negative answer to the first question, and hence remained unanswered and are immaterial here. In answer to the fourth question the jury found that the defendants on and before March 26, 1907, were entitled to believe from the acts and conduct of the plaintiff that it did not intend to be bound by the terms of the contract; and in answer to the fifth question found that the market price of such malt in Milwaukee on March 26th was eighty-five cents

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per bushel. A motion for new trial on various grounds was overruled, and judgment for the defendants rendered upon the verdict.

William L. Tibbs, for the appellant, contended, *inter alia,* that, there being no ambiguity in the language or subject matter of the written contract sued upon, it was the duty of the court to give a legal construction to the same. *Home Mut. Ins. Co. v. Roe,* 71 Wis. 33. It was the duty of the defendants, under the contract, to ship and deliver one car of malt per week commencing the last week in November until the entire 20,000 bushels of malt were delivered, without demand on the part of the plaintiff. 24 Am. & Eng. Ency. of Law (2d ed.) 1068; *Jones v. Gibbons,* 8 Exch. 920; *Tyers v. Rosedale & F. I. Co.* 12 Eng. Rep. (Moak) 631; *McKee v. Retter,* 5 Gilm. (10 Ill.) 315; *Low v. Forbes,* 14 Ill. 423; *Vogt v. Schienebeck,* 122 Wis. 491. The parties having merged their negotiations in a written contract, the terms of which, especially as to the time of shipment and place of delivery, were definite and certain, such terms could not be changed by parol evidence. 24 Am. & Eng. Ency. of Law (2d ed.) 1069; *Clark v. Cuson,* 3 Head (Tenn.) 55; *La Farge v. Rickert,* 5 Wend. 187; *Vogt v. Schienebeck,* 122 Wis. 491. By the acts and actions of the parties to the contract in not insisting upon weekly deliveries as provided for by the terms of the contract, the question of time of performance, as far as it was of the essence of the contract, was waived, and neither party could put the other in default without some notice or demand of performance. *Wichert v. Stafford,* 25 Ill. App. 218; *Bollman v. Burt,* 61 Md. 415; *Lawson v. Hogan,* 93 N. Y. 39; *Tyers v. Rosedale & F. I. Co.* 12 Eng. Rep. (Moak) 631; *Lindon v. Eldred,* 49 Wis. 305; *Jones v. Gibbons,* 8 Exch. 920; *O'Neill v. James,* 43 N. Y. 84; *Newton v. Wales,* 3 Rob. 453. There was no such evidence of a failure to make payment, or refusal to be bound by the terms of the contract, as would justify a cancellation

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of the contract or a submission of such question to the jury. *Mersey S. & I. Co. v. Naylor,* L. R. 9 App. Cas. 434; *Winchester v. Newton,* 2 Allen, 492; *Cherry Valley Iron Works v. Florence I. R. Co.* 64 Fed. 569; *O'Neill v. James,* 43 N. Y. 84; *Hoffman v. King,* 70 Wis. 372; *Flaherty v. Harrison,* 98 Wis. 559. Delay in making shipments and fulfilling the contract having been consented to by each of the parties, and the defendants not having refused fulfilment of the contract until March 26, 1907, the measure of damages would be the difference between the contract price and the market price on said 26th day of March, or within a reasonable time thereafter. *Roberts v. Benjamin,* 124 U. S. 64; *Trask v. Hamburger,* 70 N. H. 453; *N. W. I. & M. Co. v. Hirsch,* 94 Ill. App. 579; *Ogle v. Vane,* L. R. 2 Q. B. 275; *Newton v. Wales,* 3 Rob. 453; *Lindon v. Eldred,* 49 Wis. 305.

For the respondents there was brief by *Sawyer & Sawyer,* and oral argument by *H. W. Sawyer.* They contended, *inter alia,* that parol evidence was properly admitted showing the situation of the parties and the circumstances under which the contract was made, known to both parties and considered by them at the time the contract was made, for the purpose of aiding the court in construing the contract and applying it to the subject matter. *Loree v. Webster Mfg. Co.* 134 Wis. 173, 114 N. W. 449; *Boden v. Maher,* 105 Wis. 539, 543; *Vilas v. Bundy,* 106 Wis. 168; *Corbett v. Joannes,* 125 Wis. 370, 388; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 556; *Chicago, St. P., M. & O. R. Co. v. C., M. & St. P. R. Co.* 113 Wis. 161, 170; *Rib River L. Co. v. Ogilvie,* 113 Wis. 482, 487; *Brittingham & H. L. Co. v. Manson,* 108 Wis. 221, 225; *Lyman v. Babcock,* 40 Wis. 503; *Zimmer v. Settle,* 124 N. Y. 37, 42. Evidence was also properly received to explain the ambiguity arising from the fact that the contract in suit does not state, *in terms,* where shipments were to be made, and in the use of the words "Delivered

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Milwaukee" and "F. O. B. Chestnut Street Station, Milwaukee, Wisconsin," opposite and following the title "Price," instead of opposite the word "To," indicating destination. *Loree v. Webster Mfg. Co.* 134 Wis. 173, 114 N. W. 449, 450; *Pritchard v. Lewis,* 125 Wis. 604, 611, 612; *Edwards v. Wis. Inv. Co.* 124 Wis. 315, 319; *Germania Nat. Bank v. Mariner,* 129 Wis. 544, 547; *Murray Hill L. Co. v. Milwaukee L., H. & T. Co.* 110 Wis. 555, 565; *Chicago, St. P., M. & O. R. Co. v. C., M. & St. P. R. Co.* 113 Wis. 161, 169, 170; *Brittingham & H. L. Co. v. Manson,* 108 Wis. 221, 225; *Electrical A. Co. v. Standard E. Co.* 151 Mich. 662, 115 N. W. 982, 984; *Gould v. Boston E. Co.* 91 Me. 214, 64 Am. St. Rep. 221; *Head v. Miller,* 45 Minn. 546, 48 N. W. 192; *Callender, M. & T. Co. v. Flint,* 187 Mass. 104, 72 N. E. 345; *Union T. Co. v. Whiton,* 97 N. Y. 172. As the defendants could not make shipments without knowing to what place shipments should be made, it was competent to prove by parol evidence that the agreement or understanding of the parties was that plaintiff should give directions where to ship before shipments were to be made, and that shipments should be made accordingly. *Mueller v. Cook,* 126 Wis. 504, 509; *Corbett v. Joannes,* 125 Wis. 370, 388; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 556; *Agnew v. Baldwin,* 136 Wis. 263; *Hubbard v. Marshall,* 50 Wis. 322, 325; 2 Whart. Ev. (3d ed.) sec. 1051; *Gould v. Boston E. Co.* 91 Me. 214, 64 Am. St. Rep. 221; *Callender, M. & T. Co. v. Flint,* 187 Mass. 104, 72 N. E. 345; *Head v. Miller,* 45 Minn. 546, 48 N. W. 192; *Kieth v. Kerr,* 17 Ind. 284, 286; *Lyon v. W. N. Y. & P. R. Co.* 88 Hun, 27; *Richter v. Union L. & S. Co.* 129 Cal. 367; *Musselman v. Stoner,* 31 Pa. St. 265. The plaintiff being required to give notice or direction as to shipments and to make a demand upon which the defendant was required to act, the giving of such notice or demand was a condition precedent. *Warren v. Bean,* 6 Wis. 120; *Blake v. Coleman,* 22 Wis. 415; *Trapp v. New Bird-*

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sall Co. 109 Wis. 543, 553; *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327, 338, 339; *Hoffman v. King,* 70 Wis. 372, 392; *Krouskop v. Shontz,* 51 Wis. 204, 206; *Mueller v. Cook,* 126 Wis. 504, 511; *Donnelly v. Eastes,* 94 Wis. 390, 393; *Gates v. Parmly,* 93 Wis. 294, 306; *Nelson v. Stephens,* 107 Wis. 136, 145; *Mill Dam Foundry v. Hovey,* 21 Pick. 417; *Tipton v. Feitner,* 20 N. Y. 423, 425; *Nelson v. Plimpton F. E. Co.* 55 N. Y. 480; *Newton R. Works v. Graham,* 171 Mass. 352, 50 N. E. 547; *Husenetter v. Gullikson,* 55 Neb. 32, 75 N. W. 41; *Frommel v. Foss,* 102 Me. 176, 66 Atl. 382; *Alpena P. C. Co. v. Backus,* 156 Fed. 944; *Kellogg v. Frohlich,* 139 Mich. 612, 102 N. W. 1057, 1059. By incorporating into the written agreement the provision that plaintiff should direct how the malt should be shipped, whether in bags or bulk, that element became an essential part of the contract, as much as the kind and quality of the commodity to be shipped; and upon failure in respect thereto by plaintiff within the specified time, the defendants were entitled to regard and treat the contract as broken and terminated. *Davis v. Hubbard,* 41 Wis. 408, 411; *Davidor v. Bradford,* 129 Wis. 524, 527; *Woodman v. Blue Grass L. Co.* 125 Wis. 489; *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327, 339; *Frommel v. Foss,* 102 Me. 176, 66 Atl. 382; *Lawrence v. Miller,* 86 N. Y. 131, 139; *Hill v. Blake,* 97 N. Y. 216, 221, 222; *Lake Shore & M. S. R. Co. v. Richards,* 152 Ill. 59, 30 L. R. A. 33; *McGrath v. Gegner,* 77 Md. 331, 39 Am. St. Rep. 415, 417; *Newton R. Works v. Graham,* 171 Mass. 352, 50 N. E. 547; *Norrington v. Wright,* 115 U. S. 188; *Roehm v. Horst,* 178 U. S. 1; *Alpena P. C. Co. v. Backus,* 156 Fed. 944. When one party to an executory contract prevents the performance of it or puts it out of his own power to perform, the other party may regard it as terminated. *Davidor v. Bradford,* 129 Wis. 524, 527; *Woodman v. Blue Grass L. Co.* 125 Wis. 489; *Merrick v. N. W. Nat. Life Ins. Co.* 124 Wis. 221, 226;

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Kelley, M. & Co. v. La Crosse C. Co. 120 Wis. 84; *Hinckley v. Pittsburgh B. S. Co.* 121 U. S. 264; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264; *Louisville, N. A. & C. R. Co. v. Diamond State I. Co.* 126 Ill. 294, 18 N. E. 735; *Lawrence v. Miller,* 86 N. Y. 131; 9 Cyc. 639, 640, and notes 39, 40.

WINSLOW, C. J. The trial court held, in effect, that the written contract in question was uncertain and indefinite in its terms, so that it could not be determined therefrom whether it required the defendants to ship a carload of malt every week to the plaintiff at Milwaukee without further orders, or whether it required the plaintiff to order each carload by separate order before the defendants were required to ship it. So construing the contract, the court, against objection, permitted the introduction of a large amount of parol testimony relating to the situation of the parties and their negotiations resulting in the making of the contract, as well as testimony relating to the acts and correspondence of the parties after the contract in the way of practical construction thereof, and submitted to the jury the question of the proper construction of the contract in the light of this evidence.

These rulings were all challenged by the plaintiff on the ground that the contract is definite and certain in its terms, and required the defendants to deliver one carload per week at Milwaukee without further orders. This contention is based upon the written clauses of the written contract which follow the words "Price," "F. O. B.," and "When to be shipped" of the printed blank. These clauses provide, in substance, that the price shall be fifty-nine cents per bushel delivered free on board cars at Chestnut Street Station, Milwaukee, to be shipped one car per week beginning in the last week of November. If these clauses stood alone there would seem to be very good ground for the plaintiff's contention, but

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they do not. Immediately following them, in response to the question "In Bags or in Bulk?" the contract says "as ordered," meaning unquestionably that the plaintiff is to specify by separate order whether a given carload is to be shipped in bags or in bulk. Following this, the shipping directions, "Via C., M. & St. P. R. R.," are given, and the line of the blank, headed with the word "To," is left unfilled. Taking all the provisions together, and in connection with the significant, and apparently deliberate, omission of the place to which shipments were to be made, it seems clear to us that the contract is uncertain on its face, and that it cannot certainly be told by reference to its terms alone whether the parties agreed that a separate order should precede the shipment of each car or not. In this situation, evidence of the situation and surroundings of the parties as well as their communications, so far as such communications throw light upon the situation, were competent to be received in order that the court might read the contract in the same light as the parties did when they made it. *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459. The parol evidence so received was amply sufficient to show that the understanding was that cars should be shipped either to the Milwaukee brewery or to the Covington brewery as the plaintiff should order, and that when shipped to Milwaukee the malt was to be shipped in bulk, and when shipped to Covington it was to be shipped in bags, and that in either event the defendants were to pay the freight to Milwaukee. Not only does this clearly appear, but it is also certain that the parties practically construed the contract to mean that shipping orders were to precede shipments by the letters of January 8 and 9, 1907, which are quoted in the statement of facts. Under such circumstances the question of the meaning of the parties and the proper construction of the uncertain terms of the written contract was for the jury. *Vilas v. Bundy,* 106 Wis. 168, 81 N. W. 812.

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Some special objections were made to certain items of the parol testimony which was received, but we do not find it necessary to consider them. Upon the evidence which was unquestionably competent, the jury would not have been justified in coming to any different conclusion. There can be, in fact, no serious question but that, if parol evidence were competent, the contract must be construed as the jury construed it.

The sole remaining question which we deem it necessary to consider is whether there was a waiver by the defendants of the plaintiff's breach of the contract. The contract, as properly construed by the jury, required the plaintiff to order one carload per week beginning with the last week in November. A carload contained from 1,900 to 2,000 bushels, and, had a carload been ordered each week, the performance of the contract would have been completed during the first week in February. The plaintiff ordered one carload in November and one in December. On January 8th the defendants wrote, calling attention to the default, and in effect demanding that the plaintiff live up to the contract in the future. The plaintiff then ordered another carload, which upon delivery was claimed to be not up to contract requirements. A serious dispute arose on this question, which was finally settled by the defendants consenting to a slight reduction of price on February 4th. From this time until March 25th there was complete silence between the parties. The plaintiff gave no orders and the defendants made no demand for orders. On the 25th of March the plaintiff ordered a carload to be delivered, and on the following day the defendants declined to deliver any more and declared the contract canceled. Were they entitled to take this action at this time?

There may be a breach of an executory contract by deliberate refusal to perform stipulations upon which the obligation of the other party depends, and, when such breach takes place, the other party has a right to treat the contract as

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wholly terminated and take measures accordingly. But if he do not treat the contract as terminated, but continue to demand performance, he will be held to have kept the contract alive. He cannot treat the repudiation of the contract as a breach and as no breach at the same time. *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920; *Davidor v. Bradford,* 129 Wis. 524, 109 N. W. 576; *School District v. Hayne,* 46 Wis. 511, 1 N. W. 170; *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 327, 89 N. W. 542. Undoubtedly the defendants waived the breach occurring prior to January 8th by their letter of that date, but this letter cannot reasonably be held to waive further defaults, for it contains an unmistakable request to live up to the contract in the future. Had the plaintiff notified the defendants that it would order no more cars, the defendants would have been entitled to treat the contract as breached, because their obligation to ship was dependent upon the receipt of orders. While mere failure to make timely orders might not of itself alone constitute a breach upon which defendants could stand, there doubtless may be unequivocal acts which will speak a definite refusal to further perform just as loudly as words. It has been held that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. *Hoffman v. King,* 70 Wis. 372, 378, 36 N. W. 25. By their answer to the fourth question the jury found that there were such acts in the present case, and the question must be whether that finding was justified by the evidence. Upon mature reflection we think it was. After receiving the request of January 8, 1907, to make up the previous default in orders, the plaintiff wrote excusing its default and ordered another carload, but found fault with the quality of the last shipment, and said that "we must insist on the same quality as your first shipment." Upon receiving the carload sent in response to this order the plaintiff wrote, complaining seriously of its

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quality, and saying: "We cannot accept anything that is not according to the agreement." The dispute over the quality of this carload lasted ten days and became somewhat acrimonious, and was only settled by the defendants accepting a reduction in price, although both parties stood their ground. From January 9th until March 25th the plaintiff ordered no cars, although the market price was steadily advancing and the contract becoming daily more advantageous to the plaintiff and correspondingly disadvantageous to the defendants.

Under many circumstances the failure to send orders for two months might be a very insignificant matter, but certainly that cannot be said here, where prompt ordering of a product, subject to great and rapid changes in market value, was evidently a very material part of the arrangement. In view of the nature of the contract, the evident intention that there was to be rapid delivery, the dissatisfaction with the January shipment, and the repeated declaration of the plaintiff that it would insist upon the delivery of a better quality of malt in the future, in the face of defendants' claim that the quality was unexceptionable, we think that there was ample ground for the defendants to conclude that the plaintiff's failure to order any more cars, or make any sign for a period of nearly two months after delivery should have been completed, under the terms of the contract, was a deliberate repudiation of the contract by the plaintiff upon which they were entitled to stand. As they neither did nor said anything thereafter indicating that they expected or demanded performance of the contract, it cannot be said that they treated the contract as still existing, or waived their right to treat the repudiation as a breach.

By the Court.—Judgment affirmed.

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JONES, Respondent, vs. DE MUTH, Appellant.

November 11—November 27, 1908.

Appeal and error: Trial by court: Absence of exceptions: Conclusiveness of findings: Questions considered: Evidence: Books of account: Entries: Admissibility: Admissions by silence: Accounts rendered.

1. In an action for the value of a cream separator, tried by the court, absence of exception to any finding except that of reasonable value renders the findings conclusive as to all other facts to which they relate.
2. In such case the only question on appeal is whether the finding as to the value being $100 is supported by any evidence, there being no evidence to the contrary.
3. Under sec. 4186, Stats. (1898), relating to admission in evidence of books of account, absence of any evidence "that such entries are just, to the best of his [witness's] knowledge and belief," renders the entries in the books inadmissible.
4. Where a demand in the form of a bill or account is delivered to a debtor his conduct with reference thereto may be significant, and his failure to object within a reasonable time be construed *prima facie* as an admission that such bill or account is correct.
5. Such failure to object is not at all conclusive either on the fact of admission or on the fact of correctness, but is *prima facie*, subject to be overcome by other evidence.
6. Where, in an action for the value of a cream separator, it appeared from the evidence that the seller on two occasions had sent to the buyer bills specifying a designated price, and that the buyer had received and retained each bill but had made no objection to the price, *held*, that a finding of such price as the reasonable value of the separator had some evidence to support it and could not, therefore, be set aside on appeal.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action to recover for cream separator alleged to have been sold and delivered by plaintiff to the defendant with no specified price, but which was of the alleged reasonable value of $100. Answer, general denial. Action was tried to the

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court, jury being waived. The court found that on or about October 14th plaintiff sold and delivered to the defendant the cream separator; that the same was of the reasonable value of $100; that payment had been demanded but not made; and rendered judgment in favor of the plaintiff for the amount so found with interest and costs, from which the defendant appeals.

The cause was submitted for the appellant on the brief of *Minahan & Minahan,* and for the respondent on that of *George H. Kelly.*

DODGE, J. The absence of exception to any except the finding of reasonable value renders findings conclusive as to all other facts to which they relate, and thus it is established that the plaintiff sold and delivered and the defendant purchased this cream separator, that such sale was consummated on or about October 14th, and, as matter of course, the price was then fixed, not by express agreement of the parties, but by implication of law, at the reasonable value of the property. The only question, therefore, on this appeal is whether the finding that such value was then $100 is supported by any evidence, for there is none at all to the contrary.

The court seems to have found support for its conclusion in the fact, testified to orally, that plaintiff charged the separator upon his books of account at that sum. But the conditions under which books of account or entries therein are permitted to have evidentiary effect by statute (sec. 4186, Stats. 1898) were not all proved. There is entire absence of any evidence "that such entires are just, to the best of his [plaintiff's] knowledge and belief." Without such proof the entries in the books were inadmissible. *Kelley v. Crawford,* 112 Wis. 368, 371, 88 N. W. 296; *Brown v. Warner,* 116 Wis. 358, 93 N. W. 17.

But the trial court further found evidence of value in the acts of the parties, in that plaintiff on two occasions,

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about April 1 and June 1, 1906, sent to the defendant bills for the separator specifying as a price $100, and that the defendant received them. Confessedly he made no response thereto. While of course the plaintiff could not by his own act in writing or sending such bills create any evidence of the value of the separator or the price at which it was sold, yet it is quite uniformly held that, when a demand in the form of a bill or account is delivered to the debtor, his conduct with reference thereto may be significant, and his failure to object within a reasonable time be construed *prima facie* as an admission that such bill or account is correct; not at all conclusive either on the fact of admission or on the fact of correctness, but *prima facie,* subject to be overcome by other evidence. *Assignees of Field v. Moulson,* 2 Wash. C. C. 155; *Wiggins v. Burkham,* 10 Wall. 129; *Freas v. Truitt,* 2 Colo. 489; *Fisk P. & F. Co. v. Evans,* 37 N. Y. Super. Ct. 482; *Lockwood v. Thorne,* 18 N. Y. 285; *Shepherd v. Bank of Mo.* 15 Mo. 143; *Hayes v. Kelley,* 116 Mass. 300; *Hinton v. Coleman,* 45 Wis. 165; *Engfer v. Roemer,* 71 Wis. 11, 36 N. W. 618; *Rose v. Bradley,* 91 Wis. 619, 623, 65 N. W. 509. True, in *Hinton v. Coleman* this court held that presentation of a bill under the circumstances there existing constituted no evidence at all of the price of the article sold, but that was because the defendant immediately repudiated liability entirely, although without questioning the correctness of the price, and returned the bill to the alleged seller. It is at least a reasonable implication of the decision in that case that had he retained the bill and made no protest whatever it would have constituted *prima facie* evidence that the values therein specified were correct. Applying this well-established rule in the present case, we think the court was justified in holding that defendant's silence and retention of the bills without protest might be construed as an admission on his part that the price therein named was that at which the separator had been purchased, and therefore that the

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finding of $100 as such value or price had some evidence in its support. It therefore cannot be set aside, and, with the other findings, suffices to support the judgment appealed from.

By the Court.—Judgment affirmed.

WANKOWSKI, by guardian *ad litem,* Respondent, vs. CRIVITZ PULP & PAPER COMPANY, Appellant.

November 12—November 27, 1908.

Master and servant: Personal injuries to servant: Trial: Questions for jury: Duty of master to warn: Contributory negligence: Instructions to jury: Appeal and error: Prejudicial error: Argument and conduct of counsel: Special verdict: Duplicity: Excessive damages.

1. In an action for personal injuries to a servant by being caught in the cogs of wheels on a revolving shaft which he was attempting to oil, it is *held* that there was evidence to go to the jury on the possibility and probability that plaintiff was directed to oil the machinery, the credibility of the witnesses being for the jury.
2. In such case it is also *held* that the right of the plaintiff to understand, and his understanding, that the direction to oil the machinery included oiling the machinery at the place plaintiff was injured, was an inference of fact which the jury might draw from the testimony.
3. Upon the evidence in such case, stated in the opinion, it is *held* that the danger which might be incurred in oiling the machinery was not so obvious to a person of plaintiff's age, understanding, and inexperience as to either relieve the master of his duty to warn as matter of law or to charge the plaintiff as matter of law with contributory negligence.
4. *Chopin v. Badger P. Co.* 83 Wis. 192, like all precedents in negligence cases, is necessarily limited to the points actually decided upon the facts then before the court, and as an authority has not been shaken or overruled.
5. Instructions to the jury which contain a statement of the plaintiff's testimony, and which somewhat confuse the claim of plaint-

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iff made through his counsel as argumentative deductions from facts with the facts themselves, are *held* to be not prejudicial.

6. In an action by a servant for personal injuries, the court, in reference to a question of the special verdict as to whether the defendant's superintendent ordered plaintiff to do the act from which the injury followed, instructed the jury: "You will consider everything, and if as a whole it convinces you to a reasonable certainty that the plaintiff's contention as to the fact is right, then you must decide the question and answer in his favor—answer the question in the affirmative." *Held*, that this instruction is subject to the criticism that it informed the jury of the result of their answer, but that it did not go so far as to inform them expressly or by necessary implication of the effect of the answer upon the ultimate right of either party litigant to recover, and hence was not prejudicial error.

7. In an action by a servant for personal injuries by being caught in the cogs of wheels on a revolving shaft which he was attempting to oil, the court instructed the jury: "Now this does not mean whether the plaintiff had intelligence, experience, or instruction enough to enable him to see that there were cogwheels in that box on these shafts and that they were revolving, and that if he got his hands or his clothing in between them that some danger, some injury, might result from them. But the question is: Did he have such instruction, experience, or intelligence as to enable him to appreciate, to comprehend, the danger of this thing happening to him from what he saw?" *Held* that, considering the words "the danger of this thing happening to him" as equivalent to the danger of getting his hands or clothing caught in the gearing, the instruction was correct and within the rule of *Chopin v. Badger P. Co.* 83 Wis. 192.

8. In an action for personal injuries to a servant, remarks of plaintiff's counsel, in the presence of the jury, to the effect that a certain insurance company stood back of the defendant in the case, having been uttered in an argumentative objection to a proposal by defendant, and not as a deliberate offer of evidence, and having been disapproved by the trial court in the presence of the jury, are *held* not to be ground for reversal.

9. Where an affirmative answer is given to a question of a special verdict: "Had the plaintiff the right to and did he understand that said order included the machinery in said box?" the question is not open to criticism as being double, although had the question been answered in the negative there might have been some ground for criticism.

10. In an action by a servant for personal injury, an award of $5,000 damages, while high, is *held* not to be so excessive as to indicate either passion or prejudice on the part of the jury.

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APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The plaintiff had judgment for $5,000 and costs against the defendant in an action for personal injury incurred June 10, 1906. There was a special verdict finding that the plaintiff was injured by being caught in the cogs of wheels on revolving shafts which he was attempting to oil, having been ordered to do so by defendant's superintendent. The bearings or cogs in question were squeaking and smoking for want of oil. The work of oiling the machinery was dangerous to an inexperienced person, and the superintendent was negligent in ordering the plaintiff to oil the machinery without instruction or warning as to the danger incident thereunto. This negligence was the proximate cause of plaintiff's injury, and the plaintiff had not at the time he attempted to oil the machinery sufficient instruction, experience, or intelligence to have enabled him by the exercise of ordinary care to have comprehended and appreciated the dangers incident to such work, and there was no contributory negligence on the part of the plaintiff. Errors assigned raise the questions: (1) Whether there was sufficient evidence to go to the jury or support a verdict. (2) In instructing the jury. (3) For improper remarks of counsel. (4) In framing the special verdict. There is also a claim that the damages are excessive.

Charles A. Vilas, for the appellant.

Among other references upon the part of the appellant were the following: *Flaherty v. Harrison,* 98 Wis. 559, 74 N. W. 360; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 467; *McCoy v. Milwaukee St. R. Co.* 82 Wis. 215, 52 N. W. 93; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Muenchow v. Theo. Zschetzsche & Son Co.* 113 Wis. 8, 88 N. W. 909; *Burnell v. West Side R. Co.* 87 Wis. 387, 58 N. W. 772; *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *Upthegrove v. Jones & A. C. Co.* 118 Wis. 673, 96 N. W. 385; *Banderob v. Wis. Cent. R. Co.* 133

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Wis. 249, 113 N. W. 738; *Van de Bogart v. Marinette & M. P. Co.* 127 Wis. 104, 106 N. W. 805; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833; *Peake v. Superior,* 106 Wis. 403, 82 N. W. 306.

For the respondent there was a brief by *W. B. Quinlan,* attorney, and *P. H. Martin,* of counsel, and oral argument by *Mr. Martin.*

Among other references upon the part of the respondent were the following: *Neilon v. Marinette & M. P. Co.* 75 Wis. 579, 44 N. W. 772; *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Anderson v. Chicago B. Co.* 127 Wis. 273, 106 N. W. 1077; *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841; *Horn v. La Crosse B. Co.* 123 Wis. 399, 101 N. W. 935; *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 62 N. W. 527; *Taylor v. C. & N. W. R. Co.* 103 Wis. 27, 79 N. W. 17.

TIMLIN, J. There is evidence tending to support the following facts: The plaintiff was between sixteen and seventeen years old at the time of his injury, a dull-witted farm lad without mill experience and wholly illiterate. Besides his farm experience he had worked about a month in a lumber camp and about another month for the defendant, piling blocks in its pulp mill. The defendant had ample opportunity to know his incapacity and lack of experience prior to June 10, 1906. On the date last mentioned, about 6 o'clock in the morning, after the plaintiff had worked all night and was about ready to go home, the superintendent of defendant ordered him to "oil the machine." At this time there was in sight a covered box projecting somewhat above the mill floor containing shafts, journals, and cogwheels in operation which were creaking and smoking, apparently heated on account of lack of oil. No warning or instruction was given. The superintendent immediately went away. The plaintiff raised the cover of the box, and, evidently grop-

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ing or fumbling around within the box with an oil can in his hand for the purpose of finding the place in which to put the oil, his clothing accidentally came in contact with the cog-wheels and he was drawn in and severely injured.

Defendant's counsel attempts to support the first error assigned by a claim that the evidence of the plaintiff to the effect that he was directed by the superintendent to oil the machine is incredible or impossible, against all reasonable probabilities, and to support this claim points, first, to the denial by the superintendent that he gave such order, and, second, that the superintendent and other witnesses show that at the time of the accident, which the plaintiff testifies occurred immediately after that order, the superintendent was at a distance of about twenty rods from the mill. He also presents argumentative deductions from other items of evidence in support of this position. The evidence is, however, without contradiction that the superintendent was in the mill that morning about half-past 5 o'clock and shortly before the plaintiff was injured, and saw the plaintiff. We find nothing to contradict the plaintiff's statement that the box gearings were squeaking and smoking, and it is quite certain that the plaintiff did attempt to oil them. The exact time of the injury or that of the superintendent's visit to the mill is not very clearly shown, and is rather an estimate, so that as an *alibi* the evidence on this point in rebuttal of plaintiff's claim is rather weak and inconclusive. There may be some improbability in the testimony of the plaintiff to the effect that the superintendent told him to oil the machine, because of plaintiff's age and inexperience, and because there was another workman (not then present, however) who was charged with the exclusive duty of oiling the machine, but this would be matter going to the credibility of the witness and was for the jury. We cannot say there was no evidence to go to the jury on this point. Under proper instructions the jury found that the plaintiff had a right to understand,

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and did understand, that the above-mentioned order of the superintendent included oiling the machinery in the box mentioned. This was an inference of fact which the jury might draw. Neither do we think that the danger which might be incurred in oiling this machinery was so obvious to a person of plaintiff's age, understanding, and inexperience as to either relieve the master of his duty to warn as matter of law or to charge the plaintiff as matter of law with contributory negligence.

There was probably evidence upon which the jury might have found in favor of the defendant upon either of these propositions, but in our view of the case there was sufficient in the evidence to support a verdict upon these points such as the jury rendered. *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452; *Van de Bogart v. Marinette & M. P. Co.* 127 Wis. 104, 106 N. W. 805. The notion that *Chopin v. Badger P. Co., supra,* has been in some way shaken or overruled is erroneous. Like all precedents in negligence cases, it is necessarily limited to the points actually decided upon the facts then before the court. But the precedent established by that case has stood the test of time unshaken and unimpeached. We find no ground upon which the instant case could be properly taken from the jury. Several exceptions are taken to portions of the charge to the jury. The first relates to a statement to the jury of the plaintiff's testimony, and somewhat confuses the claim of plaintiff made through his counsel as argumentative deductions from facts with the facts themselves. But we are not convinced that this slip was prejudicial. The next alleged error in the instructions is in relation to the second question of the special verdict, where the instructions, among other things, told the jury:

"You will consider everything, and if as a whole it convinces you to a reasonable certainty that the plaintiff's contention as to that fact is right, then you must decide the question and answer in his favor—answer the question in the affirmative."

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This is criticised on the ground that thereby the jury were informed of the result of their answer; that is to say, an affirmative answer would be in plaintiff's favor. This sentence of the charge is no doubt subject to criticism, but it does not go so far as "to inform the jury expressly or by necessary implication of the effect of an answer or answers . . . upon the ultimate right of either party litigant to recover." *Banderob v. Wis. Cent. R. Co.* 133 Wis. 249, 113 N. W. 738. The portion of the charge under consideration rather falls within the rule of *Bauer v. Richter,* 103 Wis. 412, 79 N. W. 404, where such error was held not prejudicial, or *Lyttle v. Goldberg,* 131 Wis. 613, 111 N. W. 718, where the information to the jury was thought to reach the ultimate effect of the answers, yet because it was quite apparent that the jury must have otherwise known just what the court informed them of was held not prejudicial. Exception was taken to a portion of the charge which reads as follows:

"Now, this does not mean whether the plaintiff had intelligence, experience, instruction enough to enable him to see that there were cogwheels in that box on these shafts and that they were revolving, and that if he got his hands or his clothing in between them that some danger, some injury, might result from them. But the question is: Did he have such instruction, experience, or intelligence as to enable him to appreciate, to comprehend, the danger of this thing happening to him from what he saw?"

Considering the words "the danger of this thing happening to him" as equivalent to the danger of getting his hands or clothing caught in the gearing, this instruction was correct and within the rule of *Chopin v. Badger P. Co., supra.* It is the same idea clothed in different words.

We cannot approve the remarks of plaintiff's counsel in the presence of the jury to the effect that "the Travelers' Surety Company stands back of the defendant in this case." But, although irrelevant as argument, these words were ut-

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tered in presence of the jury in an argumentative objection to the proposal of defendant that the plaintiff be required to submit to examination as to the extent of his injuries by one Dr. Redelings, claimed by the plaintiff's counsel to be the examining physician for the Travelers' Surety Company. Hence we are unable to say that, irrelevant and improper as the remark was, it was made with intent to influence the jury against the defendant. That it had this effect is hardly possible, because the remarks made were in the presence of the jury disapproved by the court, and they were merely argumentative, not a deliberate offer of evidence as in *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833. We think the error was not prejudicial.

We find no error in the form of the special verdict. The fourth question of that verdict was as follows: "Had the plaintiff the right to and did he understand that said order included the machinery in said box?" This is objected to as double, and *Peake v. Superior,* 106 Wis. 403, 82 N. W. 306, is cited to support the objection. Had the question been answered in the negative there might have been some ground for criticism, but the affirmative answer presents no duplicity, but asserts the existence of both conditions mentioned in the question. The whole jury must have found the existence of both conditions in order to answer this question in the affirmative. *Brunette v. Gagen,* 106 Wis. 618, 82 N. W. 564. We cannot attempt to review in detail the evidence of the extent of plaintiff's pain, suffering, or injury. Suffice it to say that the injury was inflicted under most distressing circumstances of physical and mental suffering, drawing the plaintiff into the cogwheels so as to stop the machine, which had to be taken apart in order to extricate him. He was unconscious for some time, his ear was torn from his head, the side of his face disfigured, his arm broken, and he was in the hospital for a time, and since has been and is subject to pain and fits or spasms somewhat re-

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sembling epileptic fits which we cannot say are not in consequence of the injury in question. The damages are no doubt high, but we think not so excessive as to indicate either passion or prejudice on the part of the jury. *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, 67 N. W. 721.

By the Court.—The judgment of the circuit court is affirmed.

JACOBY, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

November 12—November 27, 1908.

Railroads: Injuries to employees: Contributory negligence.

In an action for injuries received by a car-repairer while repairing a car, by reason of the negligent operation of an engine upon the same track, the plaintiff is *held*, upon the evidence, to have been guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This action is brought to recover damages for an injury sustained by the plaintiff while engaged in repairing a car that was out of order. The alleged negligence of the defendant consisted in moving an engine upon the track on which the car stood that was being repaired, without any warning or precaution, whereby said car was suddenly moved, and plaintiff, in consequence of such movement, was injured. It was also alleged that defendant was negligent in failing to provide any protection against the negligent moving of the engine, and in failing to supply plaintiff with means of protecting himself, and in failing to warn the plaintiff that the track upon which the car was being repaired would be used in operating the engine which caused the accident. At the close of the testimony the court directed a verdict in favor of the defendant, and from a judgment entered upon

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such verdict dismissing the complaint plaintiff brings this appeal.

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

Edward M. Hyzer, for the respondent.

BARNES, J. At the time of the accident plaintiff was twenty-two years of age. He had worked around engines, helping machinists and doing other light work, for about four years before he was injured. He had commenced work as a car-repairer about two months before he was hurt. Before commencing work as a car-repairer he was advised of a notice and rule of the defendant company which read:

"Special Notice.

"To foremen and car-repairers:

"Car-repairers, inspectors, and other employees of this department, who have occasion to work on or about cars, are strictly forbidden to commence work on any car, the nature of which might require them to place themselves in a position on, under, or about the car, where its movements on the track could result in injury to them, without first properly protecting said car, as provided in rule 26, Rules and Regulations Operating Department.

" 'A blue flag by day and a blue light by night displayed at one or both ends of an engine, car, or train indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals, and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track, so as to intercept the view of the blue signals, without first notifying the workmen.'

"Any employee disobeying the above order will be liable to immediate discharge.

"Foremen are instructed to enforce the above order rigidly, and to keep a supply of blue flags and blue lanterns for that purpose constantly on hand.

"'Foremen are also instructed to provide each of their car-repair men with a copy of this notice, to explain it carefully to them, and to procure their acknowledgment thereof on this blank and forward the same to my office immediately."

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On April 19, 1905, he signed a statement to the effect that the rule had been read and explained to him and a copy of it left in his possession, and that he agreed to carefully observe the instructions contained therein. About May 9th plaintiff and one Squares were sent from Kaukauna to Port Washington to repair cars used about the gravel pit at that place. Plaintiff was to act as assistant to Squares or such other persons as might be sent to replace him. Before leaving they made a request upon the proper official for blue flags so that they might protect themselves while at work, as provided by the rules above set forth. They were told to proceed and that the blue flags would follow. No flags were furnished until about one week before the accident, and then but two flags were in fact sent. The plaintiff had been at work at Port Washington four weeks before he was injured. During the first two weeks he was engaged principally in putting stakes in cars, which work did not necessitate his placing himself in such a position that he could not observe the movements of the engines and cars upon the side-tracks adjacent to the gravel pit, at which about 250 men and two steam shovels were employed. During the next week and up to the time the blue flags arrived, the plaintiff and the car-repairer whom he was assisting repaired damaged cars in various parts of the yard, and protected themselves by one keeping a lookout while the other was in such a position that he could not observe the movement of engines or cars that might endanger his safety. During the week that elapsed after the two flags were received, plaintiff and his colaborer protected themselves by means of the flags. So long as the two men worked upon cars on a single side-track the two flags furnished ample protection if the signals were obeyed. If they worked upon different tracks, it is manifest that one or the other of them could not be protected by means of the flags. It does not appear that after the flags had been received, up to the morning the accident happened, these two men had occasion to,

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or in fact did, work upon different tracks in making their repairs. On the morning of the accident plaintiff and his fellow car-repairer and boss did some work on certain cars that were protected by the flags in question. After plaintiff got through he was instructed to repair a car standing upon a side-track about eighty feet from where he and his fellow car-repairer, Keller, were at work. There were five or six tracks between the track upon which plaintiff had been working and that upon which he was directed to work, and there was a string of cars standing on one of the intervening side-tracks which obscured Keller's view of the car upon which plaintiff was directed to work, although Keller could see an engine entering upon the switch track upon which the car in question stood. Keller had also completed his work when he directed plaintiff as stated, although it does not appear that plaintiff knew this to be the fact. Plaintiff made no inquiry as to whether or not he might take the flags or as to how he would be protected while doing his work. After sending plaintiff to repair the car upon which he was injured, Keller went to another part of the yard to do some work, but did not use the flags. It is perfectly apparent that plaintiff might have taken the flags if he so desired, although he may have thought that Keller had use for them. The repair that plaintiff was directed to make consisted simply of replacing a lost nut on a bolt, and it is fair to assume that neither Keller nor the plaintiff thought the job would consume much time, not so much but that the plaintiff, by ascertaining that the track was clear before beginning his work, might complete it before an engine could approach and the switch be thrown so as to permit the engine to come upon this particular track. Plaintiff found, however, that the thread on the bolt was badly worn, and he had been trying for about ten minutes to make the repair when the car on which he was working was struck. The plaintiff testified that he "kind of depended" on Keller to watch for him; that he knew

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Keller was some distance away and could not see him, but he trusted him a little bit anyway; that he expected Keller and himself to do the watching; that he thought it possible that some train might come in, so he was listening, and that he knew it was dangerous; that he expected putting on the nut would be a short job. When he went over he expected it would go quicker.

It is difficult to escape the conclusion that the plaintiff was guilty of contributory negligence in this case. When he discovered that his work would take more time than he anticipated and that he was not in a position where he could properly safeguard himself, it was his duty to either procure the flags and protect himself thereby, or advise his fellow-workman of the conditions which he found and request him to keep a lookout and warn him of the approach of an engine on the track upon which he was at work. He had little reason to suppose that Keller was paying any attention to him. If he considered the work he was called upon to do of such a character in the first instance that he could not look out for himself, it was still his duty to ask for the use of the flags, and, in the event of the refusal of Keller to permit him to use them or to keep a lookout while he was at work, to decline to do the work until he was properly protected in some manner. He knew the work was dangerous and that the rules of the company explicitly prohibited him from doing the very thing he did do. We do not mean to countenance the idea that the defendant could make rules requiring the use of flags and refuse to furnish them, and then claim immunity because of the rule. Flags, however, were furnished, sparingly it is true, but enough, so long as the two men worked upon the same side-track. The plaintiff did not request the use of these flags. If he had so requested, it is apparent he could have taken them. Neither did he request his fellow-servant to keep a lookout. He failed to use means that were at hand for his protection, and

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means that reasonable prudence on his part would require him to take advantage of. The plaintiff knew the hazard he was subjecting himself to, and that he was not asked or expected by his employer to assume it, but, on the contrary, was forbidden so to do. The contributory negligence of the plaintiff is fully as apparent in this case as was the negligence of the decedent in *Hulien v. C. & N. W. R. Co.* 107 Wis. 122, 82 N. W. 710, and the trial court was right in directing a verdict for the defendant.

By the Court.—Judgment affirmed.

STATE EX REL. MCCLURE, Respondent, vs. WALLSCHLAEGER, Village Clerk, Appellant.

November 12—November 27, 1908.

Municipal corporations: Public improvements: Work on streets: Manner of payment: Contracts: Bids.

1. A village board appointed a street commissioner and authorized him to hire men and teams and do general highway work under the orders of the board, and the commissioner employed men and teams by the day, and proceeded to fill up holes and turnpike the main village street for a distance of seventy rods with gravel hauled from a pit owned by the village. *Held*, that the board had authority to do this and defray the expense out of the general highway funds of the village created under secs. 911, 912, Stats. (1898).
2. Sec. 921, Stats. (1898), does not prevent the repair of highways by the employment of men and teams by day's work, even though the total expense of the entire work may exceed fifty dollars.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *John F. Watermolen,* and for the respondent on that of *W. B. Quinlan.*

WINSLOW, C. J. This is an appeal from a judgment awarding a peremptory writ of *mandamus* against a village

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clerk commanding him to issue to the relator a village order for $49 for labor performed in graveling one of the highways of the village, the claim having been duly presented and allowed by the village board before the commencement of the action.

The village was operating under the general charter law, and two questions are presented: *First.* Was it necessary to proceed by petition and assessment against adjoining property under sec. 905, Stats. (1898)? *Second.* Was it necessary that the work be let to the lowest bidder under sec. 921, Stats. (1898)? Both questions were answered in the negative by the trial court, and we think properly so.

The facts were that the village board appointed a street commissioner and authorized him to hire men and teams and do general highway work under the orders of the board, that the commissioner employed the relator and three other men with teams by the day, and proceeded to fill up holes and turnpike up the main street of the village for a distance of seventy rods with gravel hauled from a pit owned by the village, at a total expense of $217.75, the relator's bill amounting to $49. Under the decision of the court in *McCullough v. Campbellsport,* 123 Wis. 334, 101 N. W. 709, the village board had authority to do this and defray the expense from the general highway funds of the village created by secs. 911, 912, Stats. (1898).

As to the second question, sec. 921, Stats. (1898), provides that "all contracts for the performance of any work in any such village exceeding fifty dollars" shall be let to the lowest bidder. Upon this point it is sufficient to say that the board made no contract with the relator for work exceeding $50, nor do we regard the section as preventing the repair of highways by the employment of men and teams by day's work, even though the total expense of the entire work may exceed $50.

By the Court.—Judgment affirmed.

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MILLER, Respondent, vs. KIMBERLY & CLARK COMPANY, Appellant.

November 12—November 27, 1908.

Master and servant: Negligence: Personal injuries to servant: Guarding shafting: Statutes: Safe place to work: Proximate cause: Burden of proof: Contributory negligence: Choice by servant between dangers: Trial: Questions for jury.

1. In an action for personal injuries received by a servant it was conceded that if the master violated sec. 1636*j*, Stats. (1898), requiring shafting "so located as to be dangerous to employees in the discharge of their duty" to be "securely guarded and fenced," it was guilty of negligence rendering it liable in the action if such negligence was the proximate cause of the injury the servant received without any want of ordinary care on his part contributing thereto. *Held*, that the legislature, in the proper execution of its police power, having created the standard of the master's duty toward servants "in the discharge of their duty," the court should not interpolate into the statute the word "ordinary" and thereby test the master's conduct by a different standard.
2. In such case it appeared from the evidence that, although the defective shafting was suspended so high above the working floor as to be beyond the reach of servants in the discharge of their duties thereon, the servants had other duties, which required them occasionally, as the master must have known, to mount and walk upon timbers in the vicinity of the dangerous and unguarded shafting. *Held*, that the master ought reasonably to have apprehended that the condition of the shaft endangered the servants and was within the statute.
3. Where a servant was injured by having his overalls caught in an imperfect set-collar on a rapidly revolving but unguarded shaft, in the absence of proof that the set-collar was originally free from the dangerous defect, it is not error to submit the case to the jury on the question of negligence and proximate cause, on the theory that the shaft was to be regarded as including the set-collar and had been, from the start, in the condition it was found on the day of the injury.
4. In such case, the defect not being one which affected the efficiency of the device, nor necessarily developed by use, it was incumbent upon the master, in the first instance, to show that the imperfection did not enter into the original construction, rather

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than on the servant to prove there was negligent failure to repair.

5. Where there is conflict in the evidence as to whether there were reasonable inferences rendering any other way chosen quite as dangerous as that which the servant followed, and the way chosen was one pointed out as the proper one by the person to whom the master referred the servant for instructions when he commenced work, the trial court did not err in submitting the question of contributory negligence of the servant to the jury.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This was a controversy between employee and employer as to whether an injury which happened to the former was caused by actionable negligence of the latter.

The injury consisted of the breaking and severely wounding of plaintiff's right leg, rendering amputation above the knee necessary. While he was in the regular course of his employment in the act of stepping over the uncovered journal end of a shaft which was armed with a safety set-collar having the head of the set-screw sunk to a level with the ring, the set-collar being fixed to the shaft so as to run substantially in contact with the inner end of the box, the lower part of his overalls on the right leg caught in a defect in the collar with the result stated. The accident happened August 11, 1906.

The claim of plaintiff was that defendant was actionably negligent in maintaining an uncovered shaft and set-collar over which employees were accustomed to pass in the course of their employment and liable to be injured by coming in contact therewith. Defendant, by answer, put in issue such claim and pleaded contributory negligence.

There was evidence as follows: Plaintiff was accustomed to work about machinery, particularly such as was connected with the avocation of a blacksmith. He was upwards of forty years of age. He had been working for a considerable period

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of time prior to the accident as a blacksmith in defendant's blacksmith shop, during which time he had more or less to do with the particular machinery in question. Primarily his duty was to work at his forge, depending upon a blower operated by power transmitted thereto by means of machinery of which that he came in contact with at the time of the injury was a part. He had a helper whose duty was to attend the machinery, but in case of his absence plaintiff had to give attention thereto. He was perfectly familiar with all of the conditions he was subjected to in the course of his employment, except a breach in the set-collar. How long such imperfection had existed and whether defendant knew thereof prior to the accident, there was no proof. There was a rectangular oblong structure composed of four six-inch square timbers suspended above the floor of the shop. Across the narrow part of this framework, and about midway thereof, there was a shaft which ran in boxes at the ends of the shaft resting on blocks which in turn rested on the framework so that the shaft was some thirteen inches above the top of the timber. The south end of the shaft was fitted with the set-collar aforesaid. North of the set-collar there was a transmission pulley on the shaft thirty inches in diameter. At the north end of the shaft, set substantially up to the box on that end, there was a drive pulley. It was necessary frequently to reach the two boxes for the purpose of oiling them and sometimes to reach the drive belt at the northeast corner of the framework in order to throw such belt from the pulley and stop the machinery. There was other machinery supported on the framework so located in connection with belts that there was a choice of methods of reaching the points mentioned without dangerous interferences. When plaintiff was employed he was referred to his assistant for information as to the method of reaching and caring for the machinery. He was instructed accordingly. The way the assistant was accustomed to proceed, and the plaintiff as well

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by the former's advice, was to ascend by means of a ladder to the top of the framework at the west end, then walk on the timber, assisted, if necessary, by taking hold of a steam pipe suspended high enough to clear the drive pulley and horizontal with the long way of the framework, to the south box, and, as required, to the east corner of the framework, thence north to the point of throwing off the drive belt. In case of the steam pipe being hot so as not to admit of its being grasped by the bare hand, a hook was used with which to engage the pipe, leaving the hand at a safe distance therefrom. The thirty-inch pulley was so near the south timber that by reason of a joist set on the south side of the framework one in passing over the south box to reach the place for throwing off the belt had to go through a passageway between the pulley and the joist about eleven inches wide. On the morning of the day in question, plaintiff, observing the journal on the drive end of the shaft was heating, proceeded in the regular way to the south box with a pail of water with which to cool the "hot box." From his position at the south box he leaned over and poured water on the north box. Finding that he could not seasonably by that means restore the north box to a proper working condition, he started to go south on the timber for the purpose of reaching the point for throwing off the drive belt. In so doing he lifted his right foot to step over the end of the shaft, which was revolving at great speed, whereupon his overalls caught in the imperfection in the set-collar and he was instantly injured as before indicated.

The cause was submitted to the jury with the following result: Plaintiff, while employed in defendant's mill, August 11, 1906, was injured by having his overalls caught by a collar on the shafting that was not guarded. The shafting was so located as to be dangerous to plaintiff in the discharge of his duties. The injury was caused by failure to guard the shafting and collar. There was no want of ordinary care on plaintiff's part, aside from his continuing in defendant's

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employment with knowledge of the unguarded shaft and collar, contributing to his injury. Eight thousand five hundred dollars is required to compensate plaintiff for his injury. Judgment was rendered accordingly.

For the appellant there was a brief by *Charles A. Vilas,* attorney, and *C. H. Van Alstine,* of counsel, and oral argument by *Mr. Vilas.*

For the respondent there was a brief by *Eastman & Martineau,* and oral argument by *P. A. Martineau.*

MARSHALL, J. It is conceded, as the fact is, that if appellant violated sec. 1636*j*, Stats. (1898), requiring shafting "so located as to be dangerous to employees in the discharge of their duty" to be "securely guarded or fenced," then it was guilty of negligence rendering it liable in this action if such negligence was the proximate cause of the injury respondent received without any want of ordinary care on his part contributing thereto.

It is beside the case to argue, as counsel for appellant do in their brief, that the shaft, at the point where the injury was received, was not so located as to be dangerous to appellant's employees "in the discharge of their *ordinary* duties," particular significance being given to the word "ordinary." If the employees, from the standpoint of the master in the exercise of ordinary care, were required in the course of their employment to go about or over the shaft and so come in dangerous proximity thereto or contact therewith, whether the duty was ordinary or exceptional, the situation was within the statute. The law is cast in general terms. We cannot interpolate into it the word "ordinary," and test appellant's conduct by a different standard than the legislature, in the proper execution of its police power, created. Such limitation upon the duty to guard as might be indicated by the word "ordinary," if it were in the statute modifying the word "duty," the legislature manifestly did not intend should exist,

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from the fact that the word was industriously, by amendment, dropped from the law as it formerly existed; the words "discharge of their duty" being substituted for "engaged in their ordinary duties."

Again, it is beside the case to argue, as counsel do, with numerous supporting authorities, that such a statute as the one in question does not apply where the shafting is suspended so high above the working place of the employees as to render it improbable that they will come in dangerous proximity thereto in the discharge of their ordinary duties. Such authorities as *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153; *Cobb v. Welcher,* 75 Hun, 283, 26 N. Y. Supp. 1068; *Dillon v. National C. T. Co.* 181 N. Y. 215, 73 N. E. 978, and the like, upon which counsel rely, at this point, are all very good in their legitimate field. They apply to a situation where the employees would have to so depart from their ordinary movements in performing their work, in order to reach the dangerous machinery, that no one in the exercise of ordinary care would be likely to anticipate such an occurrence; as where a shaft is so located at a considerable distance above the level reached under any circumstances likely to occur, by employees whose duties are performed while standing or moving about on the floor. The mere fact, in such a case, that an employee might possibly ascend to the shaft by means of a ladder or otherwise, for something of an exceptional nature, does not locate such shaft within the meaning of the statute. As said in the *Powalske Case,* "where a danger is so located that a person must necessarily go out of his ordinary course, or any course which he might be reasonably expected to take, in order to reach it, ordinary care and prudence on the part of another, who is in duty bound to guard him from personal injury within the scope of the risk to be reasonably apprehended therefrom, does not require it to be guarded."

The statute does not require the employer to anticipate

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every possible danger to employees; as that one might for some purpose not reasonably to be foreseen go to an uncovered shaft suspended twelve feet or more above the working floor. So, as indicated in the case cited, "if it would not be reasonable to say, on the facts of this case, that the shafting in question was so located that respondent, in the exercise of that care for the safety of its employees which is contemplated by the statute," that is in the exercise of ordinary judgment, under the circumstances, ought to have apprehended that it might cause a personal injury to some one of them, there was no violation of the statutory duty by failure to guard the shaft; the question of fact, of course, being for the jury, if, upon the evidence, different minds might reasonably come to different conclusions in respect thereto.

What has been said, in view of the undisputed fact appearing by the statement, shows that there was evidence to go to the jury as to whether appellant breached its statutory duty or not, which disposes of counsel's first and most significant contention. Although the shaft was supported so far above the working floor as to be beyond the reach of employees in the discharge of their duties thereon, they had others, which required them occasionally, as appellant must have known, to mount and walk upon the suspended timber in the vicinity of the uncovered shaft, armed with the defective collar that was an essential part thereof. As regards such duties the danger was rather greater, on account of the imperfect set-collar, than it would have been had the shaft rested upon supports raising it a foot or two above the floor. Such being the case, there was fair ground for holding appellant ought reasonably to have apprehended that the condition of the shaft endangered the safety of employees, and was within the statute.

The second proposition presented for consideration is that the defect in which respondent's overalls was caught was the proximate cause of the accident, instead of failure to comply with the statutory requirement, and the finding of the jury

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on that branch of the case is without support, since the question in regard thereto was directed to the uncovered shaft, instead of the imperfections in the set-collar, which, according to the evidence, did the mischief, and, for aught that appears, may have existed for so short a time that want of ordinary care on the part of appellant could not be predicated thereon, there being no evidence to charge it with actual knowledge thereof. That at first blush seemed difficult to meet. Probably, had it not been for the condition of the set-collar, the accident would not have happened. It may be that, if proof had been produced that the collar was originally free from the dangerous defect, it would have been incumbent on respondent to prove actual or constructive knowledge of such defect for a sufficient length of time before the accident to have enabled appellant to remedy the same. The collar, as indicated, was essentially a part of the shaft. While there was no proof as to how long the defect had existed there was none that it did not characterize the original construction. It was a defect, so far as appears, which did not affect the efficiency of the device or necessarily develop by use. It was incumbent on appellant, in the first instance, to show that the imperfection did not enter into the original construction, rather than on respondent, as the case stood, to prove there was negligent failure to repair. So it was proper to send the case to the jury on the question of negligence and that of proximate cause as well, on the theory that the shaft was to be regarded as including the set-collar and having been, from the start, in the condition it was found on the day of the accident.

The next proposition submitted for consideration is: Was the respondent guilty of contributory negligence, as a matter of law, in starting from his position near the uncovered shaft to go to the point for throwing off the belt, taking a course which required him to step over and come in close proximity to the point of danger, instead of one safely

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distant therefrom. The claim on this branch of the case is that there was an obviously safe course which respondent might have taken, and yet he carelessly chose another and an unsafe way. If that were unmistakably borne out by the evidence, it would be difficult to avoid reaching the conclusion for which counsel for appellant contend. The infirmity is in this: There is considerable conflict as to whether there were not interferences rendering any other way than the one chosen, quite as dangerous as that, while the evidence, as indicated in the statement, conclusively shows, or tends to show, that respondent proceeded in the way pointed out to him as the proper one by the person to whom he was referred for instructions when he commenced work. In that situation it cannot be rightly held that the court erred in submitting the question of contributory negligence to the jury. At least there was room for different minds to reasonably differ in respect to the matter, which by familiar rules required interference by the jury to properly determine the controversy. It is not entirely clear but that, since the way respondent took was not so obviously and imminently dangerous that one could not reasonably submit himself thereto without expecting he would probably be injured, and he proceeded as he and his helper, who had been pointed out to him by the master as experienced in the matter, had been accustomed to, the major probabilities, at least, are clearly against contributory negligence.

At this point counsel refer to such authorities as *Sladky v. Marinette L. Co.* 107 Wis. 250, 83 N. W. 514, and *Connors v. Merchants' Mfg. Co.* 184 Mass. 466, 69 N. E. 218, holding, as a rule, that if an employee omits to pursue the usual and safe way, voluntarily taking another and unsafe way, which by the negligence of the master is left open to him, he is guilty of contributory negligence. That seems to result from an excursion outside the case in hand. The evidence at least tends to show that the usual, not the unusual, way was chosen, and is, at the best for appellant, conflicting as to whether it was

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not as safe, in view of all the interferences existing, as any, though some other way would have avoided the particular danger which caused the accident.

By the Court.—The judgment is affirmed.

DORNER and others, Appellants, vs. SCHOOL DISTRICT No. 5 IN THE TOWN OF LUXEMBURG, and others, Respondents.

November 13—November 27, 1908.

Schools and school districts: Members: Right to maintain actions: Equity: Enforcement of legal rights: Laches: Maintenance of schools: District officers: Liability: Authority to lease parochial school building.

1. Although the right of a member of a corporation to invoke the interference of a court of equity to practically coerce the corporation to enforce its legal rights against its officers exists, equitable considerations guide and control in granting or withholding relief.
2. A court will not coerce the enforcement of a strict legal right, however clear, if thereby injustice and inequity will be done.
3. A court of equity may and should refuse to upset consummated and contemplated transactions to the hurt of those who have acted in good faith at the suit of a plaintiff who, by laches or failure to protest upon opportunity before the acts were done, has induced or justified belief that he acquiesced in and approved the acts.
4. Where plaintiffs and all other taxpayers of a school district have been cognizant of the manner of conducting a district school, and the electors of the district each year have been informed that money had been spent for the purpose of maintaining sectarian instruction, and, without protest from any, at each annual meeting directed like expenditures for the ensuing year, and, on the faith of such acquiescence, believing that the taxpayers approved, the school district officers parted with the district's money, plaintiffs at least cannot equitably ask that such officers be compelled to repay the amounts expended.
5. Under secs. 423, 430, Stats. (1898), and the affirmative grant of powers therein contained, fairly and reasonably construed, a school district may maintain a common school in a parochial school building and its discretion in that regard should not be controlled by the courts.

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APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The defendant school district, for a period of about twenty years, rented from the defendant Congregation of the Immaculate Conception, a Roman Catholic church corporation, certain rooms in its school building and expended the school moneys of the district in paying teachers to conduct schools therein, and also paid certain small amounts for fuel, cleaning, and the like. The building had been erected for the purposes of a parochial school by said church corporation, and the rest of the rooms therein not rented by the district were used to maintain the parochial school, and the public school conducted in the rooms rented by the school district was characterized by certain religious ceremonies, in that certain distinctive prayers of the Catholic Church were said at intervals throughout the school day, church hymns were sung, and the teachers were nuns specially designated to the service by the superior of a Catholic sisterhood to which they belonged. In addition the scholars prior to school hours quite uniformly attended distinctively religious teaching in the adjoining church, and the school was suspended to enable their attendance upon weddings and funerals in the church. The pupils were all children of Catholic parents, members of the church congregation, with occasional exceptions of one or two at various times during said twenty years. The plaintiffs, members of the congregation, but also residents and taxpayers of the district, on behalf of themselves and others similarly situated, brought this action to enjoin the school board and district from persisting in maintaining the public school of the district in such manner and from paying out any moneys of the district for such purposes, and also to recover in behalf of the district all sums paid for maintenance of such school from the said church corporation and from the members of the school board who had joined in paying it out. The trial court

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found that the school so conducted had at all times been pervaded and characterized by sectarian instruction contrary to law, and granted injunction against continued maintenance thereof, but held that it was within the power of the school district and board to rent rooms as they deemed wise for the maintenance of a distinctively public school, and therefore refused to enjoin the maintenance thereof in the parochial school building. With regard to the moneys expended prior to the commencement of the suit, he held that the plaintiffs and all members of the school district had at all times had full knowledge, both before and immediately after the fact, of the manner in which the school was conducted and of the expenditure of the school district moneys for the purposes aforesaid, and that, having made no objection, they were guilty of laches such as to warrant the court in denying the prayer for the repayment of moneys expended for services rendered in good faith and with the tacit approval and acquiescence of all interested parties. The plaintiffs appeal from those parts of the judgment which deny injunction against maintenance of a public school in the parochial school building and deny recovery from the church corporation and from the members of the school board of the moneys paid out for teachers' salaries and other expenses of the school maintained heretofore.

For the appellants there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *M. H. Strehlow.*

For the respondents there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

Dodge, J. But two questions arise upon this appeal, and they rather narrow ones. The very important questions as to what acts may constitute the giving or allowing sectarian instruction such as is prohibited in public schools by sec. 3, art. X, Const., and whether the acts done in the instant case are within that inhibition, are treated in an able and exhaust-

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ive opinion by the trial court, but are not presented by the appeal. We are therefore to start with the fact that for nearly twenty years the school officers have annually paid school district moneys for support of a school where sectarian instruction was permitted. The question whether such payments were so unlawful that the school district, as a corporation, might maintain an action at law to recover them back from the recipients, or for damages against the district officers and their confederates for dissipating the school funds, was not decided, but affirmative answer was hypothetically assumed by the trial court, as also that the district will not bring any such action.

The right of a member of a corporation to invoke the interference of a court of equity to practically coerce the reluctant corporation to enforce its legal rights against its officers and their confederates is abundantly established by our decisions. *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798; *Webster v. Douglas Co.* 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. But, since the application must be to a court of equity, equitable considerations will guide and control in granting or withholding relief. The court will not coerce the enforcement of a strict legal right, however clear, if thereby injustice and inequity will be done. In development of this rule it is well settled that a court of equity may and should refuse to upset consummated and completed transactions to the hurt of those who have acted in good faith at the suit of plaintiffs who, by laches or failure to protest upon opportunity before the acts were done, have induced or justified belief that they acquiesced in and approved such acts. *Helms v. McFadden,* 18 Wis. 191; *Cross v. Bowker,* 102 Wis. 497, 78 N. W. 564; *Frederick v. Douglas Co.* 96 Wis. 411, 425, 71 N. W. 798; *McCann v. Welch,* 106 Wis. 142, 151, 81 N. W. 996. This rule was applied by the circuit court, who found as facts that plaintiffs and all other taxpayers had been

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cognizant of the manner of conducting the school, and that the electors of the district each year had been informed that the money had been spent for such purpose, and, without protest from any, at each meeting directed like expenditures for the ensuing year. Such finding is not antagonized by any clear preponderance of evidence. On the faith of such acquiescence, believing that all taxpayers approved, the defendant officers have parted with the money, and, quite obviously, must lose it if compelled to reimburse the district. These plaintiffs at least cannot equitably ask that the defendants so suffer for acts induced and invited by plaintiffs' own conduct.

2. We find no error in the trial court's refusal to enjoin the district and board from maintaining a common school in the parochial school building. Incidentally it may be noted that there is no prayer for such specific relief, but the court considered the question, and we will not rest upon that defect in the pleadings. Inferentially, at least, every school district is commanded to maintain a common school, for it shall be put out of existence if it does not. Sec. 423, Stats. (1898). True, this district owns a schoolhouse, twenty-eight feet by eighteen, which is obviously wholly inadequate for a common school free to all the 200 or more scholars of the district. *Non constat* anything in the record or evidence it may be wholly unable to construct a more commodious one. The school district has express power to vote a tax to hire a schoolhouse. Subd. 5, sec. 430, Stats. (1898). The school board are empowered, when directed by the electors, in the alternative to purchase or lease a site for a schoolhouse and to build, hire, or purchase a schoolhouse and to sell and convey any site for schoolhouse, the property of the district. Sec. 430, Stats. (1898). We find nothing either in the expression or policy of the statutes to prevent the school district in meeting assembled or the school board from hiring a building or part of a building in which to maintain the public school, not

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even though the district may already have a schoolhouse and the hiring may be by way of accommodation for overflow in excess of the accommodations of the schoolhouse so owned. Hence we think that the affirmative grant of powers above mentioned, fairly and reasonably construed, is sufficient to enable the district to maintain a common school in the parochial school building and its discretion in that regard should not be controlled by the court.

We are convinced that in the respects assailed by appeal the judgment is correct.

By the Court.—Judgment affirmed.

F. G. Hood & Company, Appellant, vs. Girard Lumber Company, Respondent.

November 13—November 27, 1908.

Contracts by correspondence: Meeting of minds.

A contract claimed to arise from an offer and acceptance in letters is to be interpreted and applied in the light of the facts as understood by the parties, and when the minds of the parties to the transaction did not come to an agreement on the subject of the interest in the property to be embraced in the contract, no contract resulted.

Appeal from a judgment of the circuit court for Marinette county: S. D. Hastings, Circuit Judge. *Affirmed.*

This is an action to recover on contract. The plaintiff claims the contract is expressed in the following letters. Defendant wrote plaintiff as follows:

"Menominee, Mich., 10-11-1907.

"*F. G. Hood & Co., Crystal Falls, Mich.*

"Gentlemen: Referring to the conversation which your Mr. Griswold had with the writer when in this office recently, would say that our Mr. J. W. Wells has returned to the city

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and wishes to make you this proposition: We will either buy your interest in sections 29 and 33, 42–33 for $3,566.25, or will sell you our interest for $1,188.75. Please let us know your pleasure in the matter. Yours truly,

"GIRARD LUMBER COMPANY.
"A. C. W. E. A. M."

Plaintiff replied as follows:

"Pentoga, Iron County, Mich., October 16th, 1907.
"*Girard Lumber Company, Menominee, Michigan.*
"Gentlemen: We are in receipt of your favor of October 11th offering us $3,566.25 for our interest in section 29 and 33–42–33. We accept this offer and are tonight forwarding the First National Bank of Menominee papers covering our interest, with sight draft $3,566.25 attached. Yours respectfully, F. G. HOOD & Co."

The defendant denies the contract, and relies on other parts of the transaction as showing that no contract was made as plaintiff alleges. Plaintiff offered a deed of the land in section 29 and a bill of sale of the timber in section 33, based on a license to cut the timber. This was the extent of plaintiff's interest in these sections. Mr. Griswold testified that in the conversation with defendant's officer, referred to in the above letter, he told the officer that the plaintiff owned the timber in section 33. Subsequently he testified that he had informed this officer in this conversation of plaintiff's exact interest. The officer of the defendant with whom this conversation was held testified that Mr. Griswold told him that the plaintiff owned a three-quarters interest in the fee to the lands in section 33. On July 18, 1907, defendant wrote plaintiff, stating that they would like to buy plaintiff's interest in the lands in "42–33 in which we [defendants] own an undivided interest." Plaintiff replied that they would have the timber estimated, and "we [plaintiffs] will give you our price on the three-quarter interest which we own." On September 16, 1907, defendant wrote Mr. Watson, plaintiff's attorney, asking that he have the plaintiff make them an offer "at which they will either buy or sell their interest or

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our interest" in the lands involved in the controversy. Watson replied, stating that he had acted upon the suggestion in defendant's letter and was authorized to make an offer. After stating the offer he says: "My client does not own any interest in the soil in the lands in section 33, but holds a deed to a three-fourths interest in the timber thereon." Defendant replied to Mr. Watson, declining the offer and making the offer contained in the letter of October 11, 1907, as given above. The evidence showed that, after the receipt of the instruments of transfer by the bank, the defendant wrote plaintiff, desiring that the instruments be so drawn as to state the separate consideration for each section, and objecting to the instrument conveying the property in section 33 because plaintiff thereby did not offer to convey an absolute title but only a lease to cut timber. Plaintiff complied with the request for instruments which should state the separate consideration for each section. At the conclusion of the evidence the court directed a verdict in favor of the defendant. This is an appeal from the judgment.

For the appellant there were briefs by *W. B. Quinlan,* and oral argument by *H. T. Scudder.*

For the respondent there was a brief by *Eastman & Martineau,* and oral argument by *P. A. Martineau.*

SIEBECKER, J. It is obvious that defendant's letter of October 11, 1907, offering to purchase plaintiff's interest in the lands, referred to prior negotiations which formed the basis of the offer. A reference to these negotiations shows that defendant's offer rested on an understanding that plaintiff's interest in the lands and timber amounted to absolute ownership. It also appears that plaintiff in these prior negotiations asserted that it owned the fee to the land in section 29 and owned a three-fourths interest in the timber in section 33, while in fact its interest in the timber on section 33 was only a license to cut and remove the timber within three years.

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The offer and the acceptance in the letters must be interpreted and applied in the light of the facts as understood by the parties. When so considered it is manifest that the minds of the parties never met upon the terms of an agreement for the purchase and sale of plaintiff's actual interest in the premises. The offer of the defendant referred to an interest in plaintiff as set out in the prior negotiations between the parties, while plaintiff asserts that its acceptance embraced only such interest as it actually owned. Under these circumstances the transaction does not show an agreement as plaintiff avers. It is fundamental to a valid contract that the minds of the parties meet and agree upon its terms. The minds of the parties to this transaction did not come to an agreement on the subject of the interest in the property to be embraced in the contract, and hence no contract was made for the sale and transfer of plaintiff's interest in the property. The holding of the trial court to that effect is correct.

By the Court.—Judgment affirmed.

CAMPSHURE, by guardian *ad litem,* Appellant, vs. STANDARD MANUFACTURING COMPANY, Respondent.

November 13—November 27, 1908.

Master and servant: Personal injuries to servant: Negligence: Contributory negligence: Assumption of risk: Special verdict: Inconsistent answers: Appeal and error: Findings, when disturbed.

1. In actions for personal injuries caused by the negligence of the defendant, while there may be similarity, and even equivalency, of assumption of risk with contributory negligence, they are not absolutely identical for all purposes and under all circumstances.
2. In a special verdict separate questions relative to assumption of risk and relative to contributory negligence should, in a case

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where the evidence presents such separate conditions, be submitted, unless these two subjects are grouped by the charge under a question relative to contributory negligence.

3. Where such two questions are so grouped, separate questions need not be submitted unless requested by the party entitled to make such request.

4. The rule that separate questions upon assumption of risk and contributory negligence should, in a proper case and when requested, be submitted to the jury, is only justified on the ground that the jury would be authorized to find or might find different answers to each of the two questions, which answers would not necessarily be inconsistent. The question of inconsistency depends upon the evidence in the particular case considered with reference to the questions submitted or with reference to the instructions given, or with reference to both.

5. In such case, if no other "form," "phase," or "species" of contributory negligence than assumption of risk is shown by the evidence, different answers to separate questions may be inconsistent; but if there is evidence tending to show contributory negligence as distinguished from assumption of risk, and also from that "phase," "form," or "species" of contributory negligence called "assumption of risk," then different answers are not necessarily inconsistent.

6. Where, in an action by a servant for personal injuries, the appellate court cannot say on the evidence, as matter of law, that there was or was not contributory negligence as charged, and the jury on sufficient evidence have found plaintiff's assumption of the risk, such finding is decisive against the plaintiff's right to recover.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action for personal injuries.

For the appellant the cause was submitted on the brief of *Classon & Frank.*

For the respondent there was a brief signed by *C. G. Cannon,* attorney, and *C. B. Bird,* of counsel, and oral argument by *Mr. Bird.*

TIMLIN, J. There was a special verdict by which the jury found the negligence of the defendant in permitting a saw to be used in its shop and factory without a guard or

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hood over it. This negligence caused the injury. It was then found that the plaintiff did not know, at the time of his injury, that there was danger of serious injury resulting to him from the use of the saw without a cover over it; but by the seventh question that the plaintiff ought, in the exercise of ordinary care, to have reasonably anticipated that there was danger of serious injury resulting to him from the use of the saw without a cover on it. At the same time, by the ninth question, the jury found that there was no want of ordinary care on the part of the plaintiff which contributed to his injury. Upon motion the circuit judge found the seventh question sufficient to charge the plaintiff with notice or knowledge of the danger, and therefore that plaintiff, by continuing to work with the saw, assumed this risk of his employment. On defendant's motion the court changed the answer to the ninth question from "no" to "yes," and gave judgment on the verdict so changed, dismissing the complaint. He pointed out that in the charge to the jury he had separated the questions of contributory negligence and assumption of risk, referring the latter to the sixth and seventh questions and the former to the ninth question. He therefore gave the answer to the seventh question a preponderating effect over the answer to the ninth question and held there was a legal inconsistency between these answers, and therefore changed the answer to the ninth question, as stated. It is claimed by the appellant that the seventh question is really narrower than the circuit judge thought it, and that, properly construed, it relates merely to danger of getting in actual contact with the saw and not to the danger of working around the saw in this condition, and therefore not inconsistent. We do not see how the language of this question above referred to can be so limited, and reject this construction.

The appellant's next point is that the court should have set aside the verdict as inconsistent and granted a new trial in-

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stead of changing the answer to the ninth question, and on this point he cites *Darcey v. Farmers' L. Co.* 87 Wis. 245, 58 N. W. 382, and *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735, in which this was done under somewhat similar circumstances; also *Hazen v. West Superior L. Co.* 91 Wis. 208, 64 N. W. 857; *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis. 243, 70 N. W. 486; *Wanzer v. Chippewa Valley E. R. Co.* 108 Wis. 319, 84 N. W. 423; and *Fehrman v. Pine River,* 118 Wis. 150, 95 N. W. 105, which are not so similar as the first two mentioned, but nevertheless, in case of inconsistent findings, grant a new trial.

Whether or not these findings are inconsistent in the case at bar depends on whether the contributory negligence negatived by the ninth finding necessarily included the assumption of risk affirmed by the seventh finding.

1. In decisions of this court assumption of risk by an employee has been, by slightly varying forms of expression, to a certain extent identified with contributory negligence. Beginning with the earliest case found, it was said in *Nadau v. White River L. Co.* 76 Wis. 120, 43 N. W. 1135:

"The assumption of an unusual risk in any employment by the employee is in the nature of negligence on his part, which, like any other contributory negligence, prevents his recovery."

In *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554, it was said:

"Assumption of the risk of unusual danger is a form of contributory negligence."

In *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573, it was said:

"Assumption of risk, in the sense of those ordinary dangers incident to an employment as generally carried on, of course has nothing to do with contributory negligence, for, there being no negligence on the part of the employer as to such risks, obviously there can be no contributory negligence in the sense of concurring fault."

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In other cases the word "unusual" was not used with reference to the dangers the risk of which was assumed. There is also *Darcey v. Farmers' L. Co.* 87 Wis. 245, 58 N. W. 382, where the assumption of risk was described as "a form of contributory negligence;" *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554, where it is spoken of as "a form of contributory negligence" and also as "a specific phase of contributory negligence;" *Hazen v. West Superior L. Co.* 91 Wis. 208, 64 N. W. 857, where it is described as "a species of contributory negligence," "equivalent in legal effect to contributory negligence." To the same effect is *Peterson v. Sherry L. Co.* 90 Wis. 83, 62 N. W. 948. In *Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878, it is said to be "only one specific phase of contributory negligence." Similar expressions may be found in *Koepcke v. Wis. B. & I. Co.* 116 Wis. 92, 92 N. W. 558; *Johnson v. St. Paul & W. C. Co.* 126 Wis. 492, 105 N. W. 1048, and doubtless elsewhere. But in the later cases the qualification first noticed with reference to *unusual* dangers does not appear in the words used describing assumption of risk, and in many, if not all, cases the comparison between assumption of risk and contributory negligence appears to be made from the viewpoint of their effect in defeating the plaintiff's right to recover, and also while similarity, and even equivalency, of assumption of risk with contributory negligence is asserted, absolute identity for all purposes and under all circumstances we think is nowhere asserted. On the contrary, the expressions above indicate some degree of discrimination.

2. On the other hand, it has been decided that in a special verdict separate questions relative to assumption of risk and relative to contributory negligence should, in a case where the evidence presents such separate conditions, be submitted (*Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554), unless these two subjects are grouped by the charge under a question in the special verdict relative to contributory neg-

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ligence (*Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878). And these separate questions need not be submitted unless requested by the party entitled to make such request. *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Lounsbury v. Davis,* 124 Wis. 432, 102 N. W. 941.

3. The rule that separate questions upon assumption of risk and contributory negligence should, in a proper case and when requested, be submitted to the jury can only be justified on the ground that the jury would be authorized to find or might find in the given case different answers to each of these two questions, which answers would not necessarily be inconsistent. The rule which harmonizes all the cases in this state, so far as the present question is concerned, is that whether or not different answers to the questions inquiring about assumption of risk and those inquiring about contributory negligence are inconsistent depends upon the evidence in the particular case considered with reference to the questions submitted or with reference to the instructions given, or with reference to both. If no other "form," "phase," or "species" of contributory negligence than assumption of risk is shown by the evidence, different answers to those questions might be inconsistent. But if there is evidence tending to show contributory negligence as distinguished from assumption of risk, and also that "phase," "form," or "species" of contributory negligence called "assumption of risk" (to put it that way), then different answers are not necessarily inconsistent. Of the latter class is the case at bar. There was some evidence of contributory negligence in the manner in which the saw was set and the board cut, and aside from this there is some evidence of assumption of risk in using or continuing to use the saw knowing that it was uncovered.

We do not think that on the evidence we could say, as matter of law, there was or was not contributory negligence in setting the saw and cutting the board, by making two cuts in the manner described by the testimony. But the jury on sufficient evidence found plaintiff's assumption of the risk,

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and this is decisive against the plaintiff's right to recover, and no prejudicial error in the proceedings below has been shown.

By the Court.—Judgment affirmed.

DORWIN, Respondent, vs. HAGERTY, Appellant.

November 14—November 27, 1908.

New trial: Sufficiency of evidence: Appeal and error: Review: Evidence considered: Brokers: Action for commissions: Findings by jury: Trial: Special verdict: Interrogatories: Construction.

1. If there is any credible evidence in the case to support the findings of the jury it is error to set aside such findings as are so supported and grant a new trial.
2. Where findings in favor of the defendant in a special verdict are supported by credible evidence, on appeal from an order setting aside such findings it is unnecessary to consider the evidence offered by the plaintiff on the trial, except in so far as it may tend to render that offered by the defendant so inherently incredible as not to be worthy of belief.
3. In an action on a note claimed to have been executed to plaintiff's assignor in consideration of the services of the assignor in securing a purchaser for a boat, the evidence, stated in the opinion, is *held* to support findings by the jury in favor of the defendant.
4. In an action on a contract whereby a broker was to procure a purchaser for defendant's interest in a boat, the broker claiming to have procured such a purchaser by the name of H., it appeared to be doubtful whether such a person as H. ever agreed to purchase. As part of the special verdict the court submitted an interrogatory: "Do you find there was such a man as H.?" instead of asking what the fact was in reference to his existence or nonexistence. *Held:*

   (1) The jury could not be misled by the form of the question.

   (2) The answer "No" meant there was no such man in the transaction.
5. In an action by a broker for commissions, the evidence, stated in the opinion, is *held* to support findings by the jury that H., an alleged purchaser, was not a purchaser ready, able, and willing to pay the purchase price, and that there was in fact no such person as H.

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APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This action is brought upon a nonnegotiable promissory note for $500, executed and delivered by the defendant to one W. H. Clawson, which note was assigned by said Clawson to one W. B. Allen, and was assigned by said Allen to the plaintiff. The alleged consideration for the note was the procuring of a purchaser by Clawson for a steamboat owned in part by the defendant. The defenses interposed were: (1) That Clawson fraudulently represented that he had a purchaser who stood ready and willing to buy the boat at the price fixed by the defendant, when in fact no such purchaser had been secured; and (2) that said note was delivered to Clawson with the understanding and agreement that his principal should deposit the purchase price of the boat in a Green Bay bank by a certain date, whereupon the necessary papers transferring title to the purchaser would be deposited in such bank, and that in the event of such purchase price not being so deposited no commission should be payable on account of the sale and the note in suit would not be used in any way. The purchase price of the boat was not deposited.

The jury returned the following special verdict:

"(1) Did W. H. Clawson, acting upon the defendant's written offer of June 18, 1904, procure a purchaser for the steamer Belle in H. H. Hayward, who was ready, able, and willing to buy the boat and pay for it $7,500? *A.* No.

"(2) Did the defendant *Hagerty* accept the terms of the offer in the telegram of June 19th, viz., that he should place in Kellogg Bank bill of sale of the steamer Belle, giving clear title by Wednesday? *A.* No.

"(3) Was it agreed between Clawson and *Hagerty* on June 20, 1904, that this note that *Hagerty* gave Clawson for $500 for his commission for selling the boat should not be used by him until after the $7,500 purchase price was deposited in the Kellogg Bank? *A.* Yes.

"(4) Was it agreed between said Clawson and the de-

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fendant *Hagerty* that the money or check should be deposited in the bank before the defendant was to deposit the bill of sale in the bank? *A.* Yes.

"(5) Was the reason why said money was not deposited the failure of *Hagerty* to offer or deposit a bill of sale of the boat in the bank? *A.* No.

"(6) Did *Hagerty* ask from Hayward, through Clawson, an extension of time to perfect title to the boat? *A.* No.

"(7) If you should answer the first question 'No,' then answer this: Do you find that there was such a man as H. H. Hayward? *A.* No."

The trial court, on motion of plaintiff, changed the answers of the first, second, fifth, and seventh questions from "no" to "yes," and set aside the answers to the fourth and sixth questions without substituting any answers in lieu of those returned by the jury. From a judgment entered in plaintiff's favor upon the modified verdict the defendant appeals.

For the appellant there were briefs by *Sheridan & Evans,* and oral argument by *Philip Sheridan* and *Daniel Sullivan.*

For the respondent there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *M. H. Strehlow* and *S. H. Cady.*

BARNES, J. This is not a case wherein the trial court exercised its discretion to set aside the verdict of the jury and order a new trial because the verdict was against the preponderance of the testimony. As to one of the substantial questions in the case the trial judge stated in his opinion that it had been passed upon by three juries on substantially the same testimony and that each jury had found adversely to the contention of the plaintiff as to what the fact was. The plaintiff made no motion for a new trial and stated that none was desired. He insisted that he was entitled to have the answers made by the jury to the questions in the special verdict changed and to judgment on the verdict as corrected. If

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he failed in this contention he evidently preferred that judgment should go against him rather than that a new trial should be ordered.

If there was any credible evidence in the case supporting the findings of the jury it was error to set aside such findings as were so supported. *Bading v. Milwaukee E. R. & L. Co.* 105 Wis. 480, 81 N. W. 861; *Nicoud v. Wagner,* 106 Wis. 67, 72, 81 N. W. 999; *Prahl v. Waupaca,* 109 Wis. 299, 302, 85 N. W. 350; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 467. It is therefore unnecessary to consider the evidence offered by the plaintiff on the trial, except in so far as it may tend to render that offered by the defendant so inherently incredible as not to be worthy of belief.

It appeared from the testimony that on Saturday evening, June 18, 1904, the defendant agreed in writing to give W. H. Clawson $500 commission if he made, or was instrumental in making, a sale of the steamer Belle at $7,500. On Monday, the 20th, Clawson showed defendant a telegram which read as follows:

"Chicago, June 19, 1904. W. H. Clawson, care American House, Green Bay, Wis. Close deal at seventy-five hundred clear title in my name by Wednesday place in Kellogg Bank. [Signed] H. H. Hayward."

The defendant testified that, upon receipt of the foregoing telegram, Clawson called upon him and informed him that he was obliged to go to Chippewa Falls and wanted his commission; that he refused to pay it; that Clawson represented that he knew Hayward well and that he was worth $100,000 and lived at Elk Rapids, Michigan; that he informed Clawson he would not place the bill of sale and other necessary papers in the bank until the purchase price was first deposited; that Clawson said he would immediately wire and have the money placed on deposit by the following Wednesday morning, and that if the money was not so deposited he would not use the note which the defendant finally agreed to give

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him for his commission. Mr. Flatley, an apparently disinterested witness, corroborates the foregoing testimony of the defendant in all material particulars. The defendant further testified that the reason why he did not deposit the bill of sale of the boat was that the money had not been deposited, and that he was able to carry out his part of the agreement at any time upon the deposit being made. The defendant owned a half interest in the boat and Captain Cusick owned the other half subject to a mortgage held by the defendant, and Mr. Cusick testified that he was willing to sell on the basis of $7,500. At the foot of the note in suit the following words were written by the defendant: "This note is given in accordance with the agreement with Mr. Clawson." The defendant testified that the agreement referred to was the one whereby Clawson agreed he would not use the note in any way until the purchase price of the boat was deposited in the bank. Defendant's evidence is direct to the point that he never agreed to accept the offer contained in the telegram referred to, but did agree to execute and deliver the necessary papers if the purchase price were deposited. His testimony is equally clear that the tenor and effect of the agreement with Clawson was that no commission was earned by him until the purchase money was actually placed in the bank.

There certainly was nothing inherently improbable in the evidence of the defendant or in that of Mr. Flatley corroborating it. Clawson was practically a stranger to the defendant and Hayward was entirely so, if in fact he was not a myth. A transfer of property often calls for an examination of titles and an abstract of title, as well as the draft of conveyances, so that considerable legal and other expenses are frequently incurred in reference thereto. In this case the transfer involved some negotiations with a joint owner with whom the defendant apparently was not on friendly terms. It was very natural, all things considered, that defendant desired to protect himself against needless expense by assuring

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himself that the money was forthcoming to consummate the deal before he undertook to place his conveyance in the bank.

By the answers to the second, third, fourth, and fifth questions in the special verdict the jury in effect found that the defendant did not accept the conditions of the telegram of June 19th; that Hayward, through Clawson, agreed to deposit the purchase price of the boat in the bank before defendant should be called upon to place the necessary conveyance of the boat therein; and that Clawson was not entitled to any commission until such money was deposited. It seems to us that the testimony was sufficient to support each and every of the answers to the questions referred to. It is true that a note was actually given to cover the amount of the commission, but it is also true that a reasonable explanation was offered for such action on the part of the defendant, not inconsistent with his claim that the note was not to constitute any obligation on his part in the event of the failure of Hayward to deposit the purchase money as agreed.

Undoubtedly the jury had in mind the same facts when answering the first and seventh questions in the special verdict, and found that Clawson did not procure a purchaser who was able, ready, and willing to buy the boat because the alleged purchaser was fictitious. The form of the seventh question is subject to criticism, in that it asks the jury, "Do you find that there was such a man as H. H. Hayward?" instead of asking what the fact was in reference to his existence or nonexistence. The jury, however, could hardly have been misled by the form of the question, and evidently intended to and did find, as a matter of fact, that there was no such man. The answers to these two questions were changed from "no" to "yes" by the court. In view of the conclusion reached in reference to the other questions in the special verdict no useful purpose would be served by an extended discussion of the evidence bearing upon questions 1 and 7. We are satisfied from a careful examination of all the testimony in the case

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that the jury was warranted by the evidence in answering these questions as it did. The entire transaction was tinged with suspicion. It is difficult, after a careful reading of the record, to give such transaction so clear a certificate of character that it can be fairly said that there is no evidence for the verdict of the jury to rest upon. Clawson testified that Hayward visited Green Bay in company with an expert and examined the boat. Both Hayward and his expert disappeared from sight thereafter and could not be found. No reason is apparent why, when Hayward went to Green Bay, he did not apprise one of the owners of the boat of his presence and make the best trade he could. Instead he intrusted to Clawson the matter of making the purchase, who was to receive $500 for services that apparently called forth little effort on his part.

Defendant testified that Clawson represented that Hayward lived at Elk Rapids, Michigan, and was worth $100,000. No such party lived there or was known there. No such man registered at any of the Green Bay or De Pere hotels the day it was claimed by plaintiff that Hayward was in both places. Clawson testified that he received a certified check from Hayward, drawn on a Chicago bank, for the price of the boat, but returned it because title was not furnished as agreed. The letter accompanying this check was not produced, and defendant was never notified by Clawson that he had such a check. Mr. Wagner, a bank cashier, testified that it was a custom among banks to keep a record of certified checks, and that he wrote the banking concerns in Chicago, ninety in number, in reference to the issuance of such a certified check, and received answers from all but three or four of them. None of the answering banks had any knowledge of the alleged check. The same witness testified that a letter purporting to have been written by Hayward to defendant under date of July 8th was in fact in Clawson's handwriting. If Hayward exists in flesh and blood and is the wealthy and

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prominent business man that defendant testified he was represented to be, he certainly succeeded in completely obliterating himself after the transaction in question took place. Aside from the evidence of Clawson and the telegrams produced by him, the genuineness of which is necessarily involved, there is little in the record to support the finding of the court upon questions 1 and 7.

Mr. Clawson was arrested, tried, and convicted in the municipal court of Brown county of the offense of having obtained the note in suit under false pretenses. The judgment in that case was reversed in this court. *Clawson v. State,* 129 Wis. 650, 109 N. W. 578. It was there held that the evidence was insufficient to sustain the verdict of the jury. It is not claimed that anything said by this court in that case is *res adjudicata* in this, but it is asserted, properly enough, that the criminal case is in point in so far as it passes upon the same questions that are here involved, provided the evidence on the two trials was substantially alike.

The record in the criminal case is not before us, but from an examination of the evidence as it appears in the printed case it seems to us that the evidence produced upon the two trials is different in a number of important particulars. The witness Flatley was not called upon to testify in the criminal case to any of the facts referred to in the foregoing opinion. There was no evidence in the criminal case tending to show that the letter of July 8th, purporting to have been written by Hayward, was in Clawson's handwriting. There was no evidence in the criminal case tending to show that no check had been certified for Hayward by any Chicago bank at or about the time Clawson claimed to have received the Hayward check. The evidence of the witness Lonzo, to the effect that he had seen the certified check in Clawson's possession, was one of the most convincing pieces of evidence given in the defendant's favor on the trial of the criminal action. On the last trial several witnesses testified that Lonzo's reputa-

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tion for truth and veracity was bad and that they would not believe him under oath. No attempt was made to show that his reputation was otherwise than as testified to by such witnesses.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to set aside the answers made by the court to the first, second, fifth, and seventh questions in the special verdict, and to reinstate the answers returned by the jury to all of the questions in such verdict, and to enter judgment on such verdict as corrected, in favor of the defendant.

FOELLER, Respondent, vs. HEINTZ, Appellant.

November 14—November 27, 1908.

Contracts: Building contracts: Architects: Authority: Duties: Supervision of building: Entire contracts: Substantial performance: Breach: Measure of damages.

1. An architect, as the mutual agent of builder and proprietor to construe plans for a structure and settle disputes in that regard, has no authority to change the plans.
2. The rules permitting a builder to recover upon an entire building contract, only substantially performed, less damages for incompleteness, apply to an entire contract for supervision of the execution by an architect.
3. If a builder, by inexcusable fault of the supervising and directing architect, departs from the plans agreed upon, the damages may be charged to the architect.
4. To constitute substantial execution of a building contract, or one to supervise and direct the construction of a building according to specific plans and with the usual architect's duty in such cases, the structure as completed must be the result of good-faith efforts to strictly perform and must satisfy with exactness all essentials to the accomplishment of the proprietor's purpose.
5. The test of substantial performance is not inconsistent with imperfections in matters of detail, not defeating the object of the

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proprietor by going to the root of the matter, yet requiring a considerable outlay to afford him, for a given amount of money, in substance the thing agreed upon.

6. Substantial performance is consistent with there being incompleteness in matters of detail, some of which are practicably structurally remediable and others not so, in the aggregate requiring a considerable sum of money.

7. Incompleteness consistent with substantial performance can be remedied, structurally, practicably, and reasonably, that is, without an expenditure of an unreasonable sum of money, when the element of incompleteness can be obviated without destruction of any material part of the building erected according to contract.

8. The rule of damages by which to measure the proprietor's loss in case of substantial performance only of a building contract, is the reasonable cost of remedying the defects which can be practicably remedied so as to make the structure exactly conform to the agreement, and the difference between the value of the structure so completed and one like the building agreed upon. On this subject a mistake in *Ashland L., S. & C. Co. v. Shores*, 105 Wis. 122, 133, pointed out and corrected.

9. The judicial rule grounded in equity permitting recovery upon an entire building contract, but substantially performed, aims to give the proprietor, in substance, and as near as practicable, the very thing contracted for; not merely in value, but in form and character.

10. In case of good-faith efforts to perform an entire building contract, resulting in a structure satisfying all essentials to the substantial purpose of the proprietor in making the agreement, he is obligated to pay upon the agreement the entire contract price, subject to deductions for incompleteness as stated in the foregoing, the fact that the structure as completed is of as great or even of greater market value than the one called for not being controlling.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

Action by an architect to recover on two contracts, one for making plans and specifications for a dwelling house and the other for superintending the construction thereof.

Defendant pleaded as a defense to plaintiff's second claim that the contract was entire and was not fully performed.

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He also counterclaimed for damages in the sum of $500 because plaintiff caused material departures from the plan without any authority so to do and against his protest.

The contract with the builder contained the usual provisions making the supervising architect arbitrator to settle disputes between the former and the proprietor as to the calls for the plans and other matters, but no authority was given either the builder or the architect to vary the plans in any respect without authority of or consent by defendant.

There was no controversy in the evidence but that plaintiff was entitled to recover $98.11 on the first contract and $74.19 on the second, subject to the defense for nonperformance of the latter and defendant's right to damages for such nonperformance.

There was evidence to the effect that there were material departures from the plans as claimed by the defendant and that it was practicable to remedy the same at a cost of $400. There was no evidence respecting the difference in value between that of the structure as completed and what it would have been had the plans been strictly followed. Though the plans showed a different roof projection and construction on the front of the building from that on the other three sides there was but one detail drawing. That corresponded with the plan for the side and back elevations. The builder, with plaintiff's approval, applied such detail to the front of the building although the elevation therefor plainly called for a different construction. The defendant insisted on the scheme as indicated in the front elevation being carried out to the letter, while the builder, with the approval of the architect, ignored the difference in the order of construction, making all sides correspond with the single detail drawing. The court decided as matters of fact, that the plans for the structure were unwarrantably changed by the architect in a material particular; that the change was made under pretense that the plan called for a front structurally and archi-

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tecturally imperfect, and that it was his right and duty to correct the mistake; that the change did not have reference to those corrections in minor particulars which are ordinarily, and were in the given case, within the authority of the architect to make, but appertained to a substantial feature of the building which defendant was entitled to have as designed, if he wanted it that way, whether the same coincided with the views of the architect as to architectural and structural completeness or not; that it is practicable to reconstruct the front of the building so as to make the same conform to the design, at a cost of $400; that plaintiff is not entitled to recover anything upon the entire contract for supervision because of a substantial failure to perform the same, but is entitled to recover the full amount earned under the first contract less six cents only, damages for breach of the second contract because of there being no evidence showing the difference between the value of the building as constructed and the value of one constructed according to the design. Judgment was rendered accordingly.

Sol P. Huntington, for the appellant.

For the respondent there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *S. H. Cady* and *M. H. Strehlow.*

Marshall, J. The finding that respondent exceeded his authority by approving of a material departure from the plans for the building, resulting in appellant failing to get what he bargained for, cannot be disturbed. It is conceded that the structure called for, as to the front thereof, was materially varied, but insisted that there was an inconsistency between the plan therefor and the single detail drawing, which was adaptable only to the three other sides, all four of which, from a professional standpoint, in view of the form of the building, should be in harmony, in order to be architecturally and structurally correct, fairly indicating

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a mistake in the primary drawing, rather than an omission to make an appropriate subsidiary drawing, which was in the field of respondent's authority to correct under the provision of the contract that all disputes respecting the true construction or meaning of the drawings should be decided by him and that his decision should be final. That contemplated construction, as the words clearly indicate, not material changes in principal, to fit secondary drawings. There was no question but that the former plainly called for that which respondent assumed authority to change against the protest of the proprietor, upon the ground that in the draught he had made a mistake. That was going outside the field of arbitration laid down in the submission and so not binding on appellant. An arbitrator, barring inexcusable mistakes and bad faith, is supreme within his jurisdiction, but the moment he passes beyond the boundaries thereof he becomes a usurper and his acts are void, as are all acts of usurpation. *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473; *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 85 N. W. 485; *Burnham v. Milwaukee,* 100 Wis. 55, 75 N. W. 1014. The result of all the authorities is that the award of an arbitrator so far as not within the lines of the submission is not binding upon any party thereto. 2 Am. & Eng. Ency. of Law (2d ed.) 669, 670. Within that rule we cannot see any justification for a change of the building plan under delegated authority to construe. The principal drawing, as the learned trial court rightly held, formed the basis of the contract. The details were matters of execution. In contemplation of the agreement such principal drawing, as approved by the proprietor, formed the test of what was required for performance.

The learned trial court decided that respondent, without intentional wrong, caused the departure from the plan, but in a particular easily remediable by the expenditure of $400, a small amount as compared with the cost of the structure,

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and as appears without destruction of any material part thereof erected according to contract, and yet decided that respondent was not entitled to credit for the contract price of supervision, though the rule in respect to the matter were the same as in case of the building contractor. We see no good reason why the equity of the law extended to the latter should not include the former. We approve of the conclusion of the trial court in that respect. So the right of appellant to recover depended not upon entire performance as in ordinary contract matters. Substantial performance was sufficient, under a well known exception to the general rule, having perhaps no very logical basis, nevertheless one as well entrenched in the law as any that could well be named.

In the light of what constitutes substantial performance of a building contract, it will be seen from the court's finding and the undisputed evidence, all the calls therefor are fully satisfied. The rule in that regard as recognized by this court is clearly indicated by the following:

"In building contracts, where the contractor constructs something on the land of another which by oversight, but in good-faith effort to perform, fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for," the test of substantial performance, entitling the builder to recover upon the contract, is satisfied. *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 5, 97 N. W. 515, 517.

"Substantial performance means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed. Failure as to any of such features, whether in good faith or bad faith, any departure from the contract, not caused by inadvertence or unavoidable omission, any defect so essential 'as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished,' is inconsistent with substantial performance of the contract," within the rule permitting a

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recovery by the builder notwithstanding the incompleteness. *Manning v. School Dist.* 124 Wis. 84, 108, 102 N. W. 356, 364.

The foregoing is in harmony with the general trend of authority where departure from the general rule as to the right of one to recover upon the contract and the correlative departure from the ordinary rule of damages as to the other, is recognized as in this jurisdiction, as witness the following:

"Where the contractor in good faith intended to comply with the terms of the contract, and has substantially done so, but there are some slight omissions or defects caused by inadvertence or mistake, which are not so essential as to defeat the object of the parties, or, as it has sometimes been expressed, do not go to the root of the subject matter of the contract, but are easily susceptible of remedy, so that an allowance out of the contract price will give the other party full indemnity and give him in effect just what he bargained for, the contractor may recover the contract price, less the damages on account of such defects or omissions. . . ." *Leeds v. Little,* 42 Minn. 414, 419, 44 N. W. 309, 310.

"Where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects. . . . The defects must not run through the whole, nor be so essential as that the object of the parties, to have a specified amount of work done in a particular way, is not accomplished." *Woodward v. Fuller,* 80 N. Y. 312, 315.

So, as there was no bad faith indicated in this case and appellant got, in general, a structure for the contract price satisfactory in all essentials necessary to the thing bargained for, there was substantial performance.

It follows that respondent had a right to recover on his contract subject to such compensation as appellant was entitled to for breach thereof.

What has been said leads us to a consideration of the

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proper rule of damages in such a case as this. On that branch appellant complains serious error was committed.

The learned trial court seems to have thought that if one obtains as good a building, as regards money value, as the one contracted for he is not substantially damnified, in a legal sense, regardless of whether the building furnished is like the one agreed upon or not, and so notwithstanding it may appear that the departure from the contract can be satisfied by reconstruction, not requiring destruction of any material part of the building and reconstruction thereof, at a cost ascertainable with reasonable certainty, so that the change can readily be made without any material loss to any one outside of the particular detail of construction omitted or imperfectly erected, yet the proprietor must take the imperfect thing and be remediless for the breach unless he is able to show that he will thereby be injured pecuniarily from the standpoint of market value. Such is not the law as has been laid down by this court repeatedly, as the following will clearly indicate, though it must be confessed that in one case, by inadvertence, a word was omitted in the opinion, which, if one were to read it without noting the plain declared rule of damages and the necessity for harmony for the omitted word to be read as in place, might lead to the very error which the learned court committed.

In *Arndt v. Keller,* 96 Wis. 274, 276, 71 N. W. 651, the court said:

"The contractor may recover the contract price, less the reasonable cost of completing the building so far as the same could be done practicably, the damage by delay, and the diminished value when completed because of defects not remediable without unreasonable expenditure."

What did the court mean there by "so far as the same can be done practicably," and "defects not remediable without unreasonable expenditure?" The answer must be, as it seems, as an original proposition, and we think clearly indicated by subsequent judicial expressions, when the words

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are viewed with reference to the situation dealt with, so far as completion can be accomplished without destruction of material parts of correctly constructed work, incurring the expenditure necessary to reconstruction thereof as well as construction, according to contract, of other portions involved with it, not built before at all, or constructed improperly.

In *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 133–135, 81 N. W. 136, 140, this language was used:

"The proper rule for measuring recoverable difference between substantial and complete performance of a building contract is not necessarily the cost of tearing down the defective work and rebuilding it so as to conform to the contract. It is the reasonable cost of remedying defects, so far as that can be done practicably, and the diminished value of the building as so completed because of defects not so remediable." . . . So, "the burden of proof was on the appellant to show the reasonable cost of remedying imperfections in the building which rendered performance of the contract substantial only, so far as such imperfections could be practically remedied, and the difference between the value of the structure so completed and what it would have been worth if the contract had been strictly followed."

Following the first clause of the quoted language, for the purpose of illustration, the court said:

"If a dwelling house were constructed with ceilings six inches lower than the plans called for, the recoverable loss would not be the cost of tearing down the structure and rebuilding it according to the original design, but the diminished value of the house by reason of the departure from such design."

Citing *Arndt v. Keller,* 96 Wis. 274, 71 N. W. 651, and following with this, containing the misleading feature before indicated:

"As to any defect that may be suggested, if the cost of remedying it will exceed the diminished value of the structure in a material degree, the latter is the true measure of the liability of the builders."

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Read literally, without reference to the definite rule before and after indicated, the general principle running through all the cases that the proprietor is entitled to the very thing contracted for, the amount of work and material contemplated in the precise form agreed upon, or its equivalent, so far as that can be practicably furnished, would be plainly violated. The closing part of the paragraph referred to the preceding sentence and dealt with the kind of imperfections therein suggested; those requiring substantial destruction of material parts of a building created according to contract and a beginning over again in order to remedy the defects. The word "such" must be considered in place after the word "any" for harmony and to express the sense intended, thus: "As to any *such* defect that may be suggested, if the cost," etc.

In confirmation of the foregoing we refer confidently to what the court said in *Manning v. School Dist.* 124 Wis. 84, 100, 102 N. W. 356, 361:

The "contractor is entitled to recover the contract price, less such deductions therefrom as will make good to the proprietor the imperfections in the work. Such equivalent for the imperfections and the substantially completed work are regarded as affording the proprietor the full performance of the contract to which he is entitled. So far as the imperfections can be remedied *without any great sacrifice of work and material wrought into the subject of the contract and the proprietor's property,* the contract price is to be reduced by so much as will measure the reasonable cost of applying such remedy, and otherwise the contract price is to be rebated to the extent of the diminished value of the subject of the contract by reason of the defects."

The last expression of the court on the subject is in *Manthey v. Stock,* 133 Wis. 107, 110, 113 N. W. 443, 444, where *Manning v. School Dist., supra,* was referred to with approval. It was said that for "mere incompleteness in respects easy to be supplied after the contractor finishes his

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work, and the cost of which to the owner is readily ascertainable, . . . the owner can obtain all that he contracted for by mere expenditure of money."

It will readily be seen how inconsistent with the foregoing is the idea that in all cases of substantial performance the proprietor is bound to accept the thing tendered, subject to a mere equivalent of credit for the difference between the reasonable value thereof and that of the thing agreed upon in case the cost of remedying the imperfection is greater than such difference. The law does not sanction any such radical invasion of one's rights to secure by contract and have the very thing he desires.

One is liable to be led astray in studying this subject by referring indiscriminately to authorities elsewhere, unless he appreciates that the right to recover for part performance of an entire building contract is widely distinguishable from such right generally. The exception is purely of judicial creation, having in view the inequity of permitting a person to suffer great loss to the enrichment of another, in a situation where, in the very nature of things, no opportunity exists for the former, practicably and reasonably, to restore the latter to his former position, as in case of one constructing a building upon the premises of another which that other must necessarily receive because of its being incorporated into and an inseparable part of his property.

The equity is regarded differently in some jurisdictions than in others, and in the judicial efforts to give a remedy to the one party without unduly injuring the other we find a well defined classification of holdings according to jurisdictions. Some, notably New York and Minnesota, are in line with this court. Others permit a recovery for that which they denominate substantial performance, not on the contract, but on a *quantum meruit* not exceeding the contract rate. Others on a *quantum meruit* on a basis *quantum*

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valebat. Still others permit a recovery, regardless of substantial performance, to the extent of the actual value of the labor and material to the proprietor, which has become incorporated into his property. The result is that substantial performance as viewed in some jurisdictions is not, strictly speaking, the same as viewed in others, as we suggested in *Manning v. School Dist., supra.*

The variation from the general rule being grounded on principles of equity, the contractor must at all events come into court with clean hands, in that his conduct in departing from the agreement must not appear characterized by actual bad faith nor such gross negligence as to be a substantial equivalent thereto. That feature being absent, by the rule which prevails in the class to which our jurisdiction belongs, as has been indicated, and the result being a structure which in all essential particulars satisfies the substantial purpose which the proprietor had in view in making the agreement, he is required to pay, as upon the contract, the entire price, but is compensated for the departure from the general rule, on a basis of damages somewhat more severe than in ordinary cases. His right to have the very thing agreed upon, as said in *Manning v. School Dist., supra,* to just what he contracted for in the form agreed upon, is fully recognized in effect. He cannot be put off with something different, even though that thing, in a strict pecuniary sense, be as valuable as the one the contract called for. His right to have his own peculiar notion, however whimsical, effectuated, even in the face of good-faith imperfect performance, is not lost sight of. To accomplish that by rules of a court of conscience, he is compensated for the minor departures not inconsistent with substantial performance, by an equivalent in money or deduction from the agreed price, not at the contract rate for supplying such departure, as may be practicably done without destruction and reconstruction of material parts properly in place, but the reasonable cost thereof under the circumstances,

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and in addition thereto such further sum as will measure the actual diminished value of the structure because of defects not so remediable.

This, of course, does not deal with material departures "running through the whole structure," as was said by the New York court in the language quoted from *Woodward v. Fuller,* 80 N. Y. 312, 315, or "so essential as that the object of the parties to have a specified amount of work done in a particular manner is not accomplished," because in that case the feature falling short of substantial performance precludes recovery at all upon the contract on a *quantum meruit,* in the absence of acceptance other than that growing out of reception of a benefit, which in the nature of things cannot be prevented. *Manthey v. Stock,* 133 Wis. 107, 113 N. W. 443; *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515. As we have repeatedly pointed out, the relaxation of the general rule, out of the charity of the law, which is regarded as justifying an invasion of strict contract rights, must be administered with great care, to the end that the equity extended to the one shall not be abused to the prejudice of the other, in that it invades the equivalent due to him, which must efficiently subsist in order to preserve that liberty of contract entitling him to satisfy his own fancy as to the creation he shall acquire.

Within the rules above stated, as we understand the evidence and findings, there was substantial performance, as counsel for respondent claims, and the imperfection was remediable without any change except a reconstruction of a minor part of the building, not requiring any invasion of other parts and at an outlay easily ascertainable, and which was ascertained and found. So the defect was one which it was perfectly practicable to remedy within the meaning of *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136, and one which the respondent should be required to remedy or render a full equivalent therefor.

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Reference might be made to numerous authorities elsewhere on this subject, where the rule of damages in a case of this sort is enforced, in the main at least, the same as here, but they would be of little or no benefit except, perhaps, to illustrate the meaning of the term "practicably remediable." For instance, in *Pitcairn v. Philip Hiss Co.* 113 Fed. 492, the contract price of the entire work was $5,200. Only a minor part of the work was imperfectly performed. The evidence was to the effect that a destruction and reconstruction thereof so as to make the whole work conform to the contract would cost $500. The court held that, if notwithstanding the defect there was substantial performance, the contractor could recover on the contract the agreed price, less the $500. In *Jones & H. Co. v. Davenport,* 74 Conn. 418, 50 Atl. 1028, a deduction of $100 from a contract price of $435 was allowed under the same circumstances.

In 3 Page, Contracts, § 1387, without perhaps a proper discrimination between rules applicable to different jurisdictions, it is stated as elementary law, that in case of substantial performance of a building contract a recovery can be had thereon of the contract price, less the amount that will be necessary to make the building conform to the terms of the contract. Rarely will it be found anywhere that the distinction is definitely made, as here, between those particulars rendering completion only substantial, which are remediable without loss by material destruction of other parts, hence "practicably remediable," and those which are not. In that respect our rule is more comprehensive and equitable to both proprietor and builder than the one which in many jurisdictions obtains. In no other way does it seem practicable to insure to the proprietor such rebate from the contract price on account of the incompleteness as will give him, in substance, what he bargained for.

Applying the foregoing here, the situation between the parties should be determined by crediting respondent with

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the amount unpaid upon the two contracts, decided to be $172.30, and charging him with the reasonable cost of completing the structure as agreed upon, decided to be $400; he, not the builder, being the one really at fault in the matter. That leaves a balance of $227.70 in favor of appellant for which he should have judgment as of the time the one in question was rendered.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in appellant's favor for $227.70 as of date of the former judgment, with costs.

BARNES, J., took no part.

GUENTHER, Plaintiff in error, vs. THE STATE, Defendant in error.

November 14—November 27, 1908.

Criminal law and practice: Indictment and information: Plea in abatement: Demurrer: Appeal and error: Prejudicial error: Instructions to jury: Embezzlement: Settlement of claims: Defenses.

1. In a criminal prosecution a demurrer to a plea in abatement—that defendant had not had a preliminary examination as provided by law, had never waived his right to such examination, and was not a fugitive from justice—admits the truth of the facts alleged and precludes the defendant from offering any proof thereon.
2. In such case, while sustaining the demurrer may be error, it will not require a reversal if no prejudice is caused thereby.
3. In a criminal prosecution for embezzlement the evidence, stated in the opinion, is *held* sufficient to warrant a conviction.
4. Where an employee made sales on credit, instructions as to the ownership of the debts thereby created and the circumstances under which the employee would have been guilty of embezzlement for misappropriation of the moneys when collected, even

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if erroneous, are not prejudicial, when the proceeds of such sales or credit accounts are not included in the amount found by the jury to have been embezzled by the employee.

5. Where a crime is committed by the complete embezzlement of moneys, the guilty person is none the less liable to the owner for the moneys so embezzled, and payment thereof or settlement therefor by a note does not expunge or contradict the guilt of the already completed embezzlement.

6. In such case instructions relating to the significance of the acts of the employer in retaining a promissory note to cover the shortage are immaterial to the result of a criminal prosecution.

7. In a criminal prosecution for embezzlement, evidence of a statement to the defendant, an employee, that his employer "doesn't want his men to be living in poverty, so if you need a little money,—at first you may need some of the money used for sales and pay it back when you are able," is *held*, at the most, to authorize trifling application of moneys for current living expenses anticipatory of the $40 monthly salary to be allowed defendant, and not to authorize expenditures of about $600 in the repair of defendant's residence.

ERROR to review a judgment of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Writ of error to review conviction of the plaintiff in error upon information charging that on or about February 1, 1907, the plaintiff in error embezzled the sum of $850 from H. E. McEachron Company, a corporation, of which he was an employee. When the case was called plaintiff in error interposed a duly verified plea in abatement alleging that he had not had a preliminary examination as provided by law before a justice of the peace or other examining magistrate or officer and that he had never waived his right to such examination, and that he was not a fugitive from justice. To this, at the suggestion of the court, the district attorney filed a demurrer, whereupon the court ruled:

"It is the opinion of the court, from all papers and files in this case, that the plea in abatement is not well taken, and that the demurrer on the part of the state is well taken and should be sustained, and that the defendant should stand for trial upon the merits of the case as alleged in the information."

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This ruling was excepted to. Thereupon the case proceeded to trial, resulting in verdict of guilty of embezzling of money to the amount of $273.50 as charged in the information; whereupon, after motion for a new trial, judgment and sentence was pronounced.

For the plaintiff in error the cause was submitted on the brief of *Veeder & Veeder.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

DODGE, J. 1. This record presents at the threshold very serious embarrassment because of the incongruous procedure upon defendant's plea in abatement, which had attempted to assert the fact that he had been denied the very valuable right and protection of a preliminary examination, and thus was about to be subjected to trial upon an information in the mere discretion of the district attorney—a right and protection which is assured him by sec. 4654, Stats. (1898). *State v. Sorensen,* 84 Wis. 27, 30, 53 N. W. 1124. It is quite apparent that the court, instead of considering whether the plea itself on its face was good or bad, decided upon the record that it was not supported in fact, this record consisting in the return of the justice showing an examination before him; but, although the district attorney offered to make proof of those facts, the court directed him to interpose a demurrer, which he did, whereupon the plea was dismissed. Thereby, of course, the facts alleged in the plea were admitted and defendant was precluded from offering any proof thereof. If it were true that the apparent return of a justice showing an examination were a complete forgery, or that the person making such return were a wholly unofficial person having no jurisdiction, defendant would have been by such ruling precluded from such proof. A consideration of facts *dehors* the plea was therefore improper and erroneous,

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but this error need not result in reversal if no prejudice was caused thereby. It is obvious that the court assumed that the plea attempted to raise the insufficiency of the examination in fact held and reported upon the record by the justice, and plaintiff in error, with this obvious fact before him, made no suggestion of any desire on his part to raise other questions of fact upon that examination. Hence we think it plain that the real question which he raised was considered by the court and resolved against him. It has been held that such a condition, if the decision is right, will not require a reversal, however irregular the proceedings of the trial court may have been. *Martin v. State,* 79 Wis. 165, 170, 48 N. W. 119; *Baker v. State,* 80 Wis. 416, 418, 50 N. W. 518; *Lester v. State,* 91 Wis. 249, 251, 64 N. W. 850. We are persuaded that such situation exists here, for the record of the justice of the peace which was before the circuit court and within its judicial knowledge disclosed a sufficient preliminary examination as to the facts and circumstances which constituted the crime for which defendant was tried and convicted in this case and a proper binding over for trial. Hence, however much we may deplore the irregular and illogical method in which that question was disposed of by the trial court, we think it obvious that the same result would have been attained had regular proceedings been followed, and that plaintiff in error suffered no prejudice.

2. There was in our opinion abundant evidence from which the jury might have found that plaintiff in error embezzled moneys of the McEachron Company intrusted to him with no authority to use the same except in paying for property purchased for it or in defraying the expenses of the business conducted for it by the plaintiff in error, to the amount found by the jury. We think it clear that there was evidence from which this result might have been reached without considering the misappropriation of the proceeds of any goods sold by defendant on credit, as to which there

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is a claim made that he was liable as a debtor and not a custodian by reason of his having assumed personal responsibility therefor. The prosecuting attorney consented that all such transactions might be eliminated from consideration in ascertaining the fact and amount of defendant's embezzlement, and they were so eliminated.

3. Error is assigned upon certain instructions with reference to the ownership of the debts last above mentioned for goods sold on credit and the circumstances under which defendant would be guilty of embezzlement for misappropriation of the moneys when collected; but, since the proceeds of these sales or credit accounts were none of them included in the amount found by the jury to have been embezzled, the instructions, even if erroneous, could have had no prejudicial effect. Another portion of the charge assigned as error related to the significance of the acts of the McEachron Company in retaining and passing to the district attorney a certain promissory note which defendant had delivered to its agent when his shortage was ascertained, in attempted settlement of his indebtedness, and which the accountant had received but not accepted in order to tender it to the company. The only significance of the instructions was upon the question whether the company had by retention accepted the note so as to effect a settlement of defendant's liability to it. This question was wholly immaterial to the question of defendant's guilt in this case. Although he had completely embezzled the moneys of the McEachron Company and thereby committed a crime, he none the less was liable to the owner for the amount of the moneys so embezzled, and the payment thereof or settlement therefor by his note could in no wise expunge or contradict his guilt of the already completed embezzlement, and such instruction was therefore immaterial to the result of the criminal prosecution.

4. Errors are assigned upon certain portions of the charge

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to the effect that defendant should be presumed to intend the obvious and necessary consequences of his act; that the act of consciously taking his employer's money and spending it in repair of defendant's house necessarily put it out of the owner's reach. These instructions were accompanied by others declaring the necessity of a fraudulent intent to appropriate to his own use and to defraud the owner. The complaint is that the instruction wholly ignored the mitigating effect of the owner's consent to the taking and use. This criticism would be cogent if there had been evidence of consent to any such taking or use. Defendant admitted that he did use the money to amount greater than found by the jury, namely, about $600, to repair his residence. Such taking all occurred after January 31, 1907. The only statement of any permission to use the employer's money is testified to by defendant as of the time of his employment about August 6, 1906, in the following words:

"He furthermore told me the McEachron people doesn't want his men to be living in poverty, so if you need a little money—at first you may need some of the money used for sales and pay it back when you are able."

We think it clear that this could not reasonably be understood as permission of the conceded acts of defendant. It at most authorized trifling application of moneys for current living expenses anticipatory of the $40 monthly salary to be allowed to defendant and not a diversion of large sums for substantial repairs and remodeling of his house six months later. We are persuaded that no error was committed in failing to suggest consent as a defense for these admitted misappropriations by defendant, especially in absence of any request for such suggestion.

We discover nothing to justify discussion in the somewhat vague criticisms upon some other portion of the charge or upon certain remarks of the court in course of the trial, certainly nothing of prejudicial error to necessitate reversal.

By the Court.—Judgment affirmed

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PHILLIPS, by guardian *ad litem*, Respondent, vs. PORTAGE TRANSIT COMPANY, Appellant.

November 11—December 1, 1908.

Service of process: Foreign corporations: "Agent:" Personal service: Pleading: Complaint: Prayer for relief: Verification by guardian ad litem: *Default judgment: Proof of cause of action: Opening default: Meritorious defense: Answer: Allegations on information and belief: Discretion.*

1. Under subd. 13, sec. 2637, Stats. (1898), providing that service of summons on foreign corporations not otherwise specified may be made upon any agent having charge of or conducting any business for such corporation within the state, the captain of a vessel of a corporation plying on the Great Lakes and stopping to receive or discharge cargo at ports within this state is an agent within the calls of the statute.
2. Where service of a summons is properly made upon the captain of a vessel plying on the Great Lakes and stopping to receive or discharge cargo at ports within the state, it is unnecessary, on an application to set aside the service of the summons, to consider the effect of a general appearance.
3. In an action against a corporation, where the service of the summons has been made upon an agent designated by the statute as a proper person upon whom service could be made, the service is personal within the meaning of the statute authorizing entry of judgment by default.
4. In an action for personal injuries brought by the guardian *ad litem* of a minor, the allegations of negligence in the complaint, stated in the opinion, are *held* sufficient, in the absence of any objection before verdict.
5. In an action for personal injuries the complaint was not served with the summons, and never served upon the defendant, and the prayer for relief, instead of closing with the usual demand for damages, contained the phrase "in all to his damages five thousand dollars." Judgment was entered on default, and on motion to set aside the judgment it was insisted that the complaint contained no demand for relief within the calls of sec. 2646, Stats. (1898). *Held*, whether such prayer would have been sufficient in a case where the complaint had been served with the summons and judgment taken by default—a point not decided—the defendant was in no way prejudiced, and hence under sec. 2829, Stats. (1898), the defect, if any, should be disregarded.

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6. A guardian *ad litem* verifies as a party and the rules respecting verification by a party apply; and hence, if the guardian *ad litem* verifies a complaint positively and of his own knowledge, it is properly verified.
7. On a motion to set aside a judgment entered on default it appeared, among other things, that the complaint was duly verified and that the evidence offered was ample and sufficient to support the verdict of the jury on the amount of damages found. *Held:*

   (1) Under sec. 2891, Stats. (1898), plaintiff was obliged only to make proof of his damages.

   (2) Even if plaintiff proved more than he was obliged to, the evidence offered did not negative and in no way affected his right to recover.

   (3) It was not error to refuse to set aside the default judgment.
8. On a motion to set aside a default judgment the allegations of the answer were very meager upon the facts going to the defense, and were upon the information and belief of the president of the defendant corporation, who, it appeared from the record, had no personal knowledge thereof, although conclusions of law were stated positively upon the knowledge of the pleader. There was no affidavit produced to support the allegations of the answer as to the merits of the defense. The trial court was of the opinion that the ends of justice did not require that the judgment be set aside, or that such excuse had been shown as called for the exercise of the court's discretion in defendant's favor. *Held*, that the motion was addressed to the sound discretion of the trial court, and that there was no abuse of discretion in denying the motion.

APPEAL from orders and a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This action was commenced for the recovery of damages on account of personal injuries alleged to have been sustained by plaintiff, *Frank Phillips,* at De Pere, Wisconsin, on or about the 11th day of August, 1906, through the negligence of defendant. The summons was served by the sheriff of Manitowoc county upon one W. J. Cowles, captain of defendant's steamer, on the 28th day of September, 1906, at the city of Manitowoc, Manitowoc county, Wisconsin. The

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complaint was not served with the summons. The defendant failed to appear and the case was brought to trial at the 1906 general term of the circuit court for Brown county at Green Bay, Wisconsin, before Hon. SAMUEL D. HASTINGS and a jury, and judgment rendered in favor of the plaintiff on the 3d day of December, 1906, for the sum of $2,500 damages, together with costs, taxed at $37.72, aggregating $2,537.72. On the 9th day of November, 1907, the defendant appeared specially and moved that the service of the summons as well as the judgment be vacated and the action dismissed for the reason that the summons had never been served upon the defendant and that the court acquired no jurisdiction of the action. On the 25th day of November, 1907, the motion was denied with $10 costs. On January 22, 1908, defendant served notice of the entry of the order denying the motion of defendant to set aside the service of the summons and refusing to vacate the judgment. On November 30, 1907, defendant appeared and filed with the court an order to show cause why an order should not be made vacating and setting aside the judgment and opening the default and allowing the defendant to defend, which motion was denied with $10 costs. On April 1, 1908, notice of the entry of this order was served upon plaintiff. Exceptions were filed to said orders, and defendant appealed from the judgment and both orders.

For the appellant the cause was submitted on the brief of *Markham & Markham* and *A. L. Hougen.*

M. E. Davis, for the repondent.

KERWIN, J. 1. The first claim made by counsel for appellant is that the order refusing to set aside the service of the summons was erroneous. This claim is based upon the contention that the captain was not a person, within the meaning of the statute, upon whom service could be made. Subd. 13, sec. 2637, Stats. (1898), provides, in effect, that service

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upon a foreign corporation of a class to which the defendant belongs may be made upon any agent having charge of or conducting any business for such corporation within the state. It appears very clearly from the record that the captain of the boat was such an agent within the meaning of the statute. He was, at the time of the service and prior thereto, conducting business of the defendant corporation within the state, therefore was an agent upon whom service could be made. Subd. 13, sec. 2637, Stats. (1898); 20 Am. & Eng. Ency. of Law (2d ed.) 199. The service upon the captain being good, it is unnecessary to consider the effect of a general appearance.

2. It is further insisted that the court below erred in its order refusing to set aside the judgment entered by default for several reasons, namely: (1) that the service was not personal; (2) that the complaint did not state a cause of action; (3) that there was not sufficient proof to warrant the entry of judgment. The service having been made upon an agent designated by the statute as a proper person upon whom service could be made, the service was personal within the meaning of the statute authorizing entry of judgment by default. The complaint stated a good cause of action. It stated, in effect, that the plaintiff was a minor and that the action was brought by the guardian *ad litem* duly appointed; that the defendant was a foreign corporation, organized under the laws of the state of Ohio, and was the owner of and engaged in operating a steam vessel known as the Portage; that on or about the 11th day of August, 1906, while said steamer was at the docks of the Co-Operative Coal Company in the city of De Pere, Brown county, Wisconsin, and the defendant engaged in loading and transferring blocks of ice from the dock to the upper part of the steamer, the plaintiff, at the same time being engaged as employee of said Co-Operative Coal Company, was injured by the careless and negligent handling of ice by the defendant in such manner

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as to cause a large block thereof to fall upon him, seriously injuring him, in consequence of which he suffered great pain and anguish of body and mind, and was permanently lamed and crippled so as to unfit him for performing manual labor, in all to his damage $5,000. Objection is made to the complaint on the ground that it fails to set forth the particular facts of negligence relied upon. Whether the complaint would have been subject to a motion to make more definite and certain we need not determine, because we are convinced that, in the absence of any objection before verdict, the allegations of negligence were sufficient. It is insisted that the complaint contained no demand for relief and was not properly verified. Instead of closing with the usual demand for damages it contains the phrase "in all to his damage five thousand dollars," and it is insisted that this is not a sufficient demand for judgment under sec. 2646, Stats. (1898), which provides that the complaint shall contain a demand of the judgment to which the plaintiff supposes himself entitled, and, if the recovery of money be demanded, the amount thereof shall be stated. Sec. 2886, Stats. (1898), also provides that the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; and sec. 2829 provides that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect. In the instant case the complaint was not served with the summons and was never served upon the defendant, but was filed at or shortly before the trial. So it is very clear that the defendant could not by any possibility have been prejudiced by the defect complained of respecting the demand for judgment. It is true the demand was not in the usual and customary form, and whether it would have been sufficient in a case where the complaint had been served with

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the summons and judgment taken by default we do not find necessary to decide, since we are very clear that the defendant was in no way prejudiced.

The complaint was verified by the guardian *ad litem* positively and of his own knowledge. It is argued by appellant that this was not a good verification, but that the verification should have been made by the infant plaintiff, and it is urged that the guardian occupied the position of an agent of the plaintiff and therefore it was necessary that he should have stated his knowledge. We do not think the rule contended for by appellant applies in the case of verification by a guardian *ad litem,* but that the guardian *ad litem* verifies as a party. Therefore the rules respecting verification by a party apply. 22 Cyc. 685; *Clay v. Baker,* 41 Hun, 58; *Turner v. Cook,* 36 Ind. 129.

It appears from the record before us that the defendant did not appear prior to the entry of judgment, and that the case was placed upon the calendar for trial and due proof made of the default and the damages assessed by a jury. It is claimed by counsel for appellant that the plaintiff in making his proof introduced some testimony relating to the question of negligence in addition to evidence on the question of damages, and that because he offered some evidence respecting his right to recover he was obliged to make a complete case, and having failed to do so he was not entitled to judgment. We cannot agree with counsel in this contention. The complaint being duly verified, plaintiff was obliged only, under sec. 2891, Stats. (1898), to make proof of his damages. *Trumbull v. Peck,* 17 Wis. 265; *Gorman v. Ball,* 18 Wis. 24; *Sibley v. Weinberg,* 116 Wis. 1, 92 N. W. 427. The evidence offered did not negative the plaintiff's right to recover, and it was ample and sufficient to support the verdict of the jury on the amount of damages found. So, even if it be conceded that the plaintiff proved more than he was obliged to, it in no way affected his right to recover. We

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therefore find no error in the refusal of the court to set aside the service of the summons or the default judgment.

3. It is further strenuously urged that the court below should have opened the default and permitted the appellant to defend. The learned trial judge rendered an opinion on denial of the motion, from which it appears that it was denied because of failure to show mistake, inadvertence, surprise, or excusable neglect, and because there was not a sufficient showing of merits. It appears from the record that at or about the time of the service of the summons and attachment upon the captain, September 28, 1906, the captain consulted with an attorney respecting such service and was advised that the sheriff had no right to make the attachment, and that it was void and the seizure of the boat under the attachment illegal; and he was further advised to have the defendant employ an attorney at Green Bay or elsewhere to move to set aside said service of such summons and attachment. It also appears that on October 1, 1906, the defendant was informed by the captain of the attachment, and defendant instructed the captain to disregard it and to put the sheriff off the boat, and if he would not go when ordered, or could not be put off, to carry him away with the boat. The boat was removed in the absence of the sheriff shortly after the attachment had been made, and nothing further done by defendant respecting the service until long after judgment had been entered. It does not appear that defendant was ever advised that the service of the summons was not good, but defendant paid no attention to it and made no move until long after judgment was rendered. The purpose of the defendant obviously seems to have been to get the boat out of the possession of the sheriff and beyond the jurisdiction of the court and pay no attention to the service. Moreover, the showing of a defense on the motion to open the default was not strong. The court below held that while there were sufficient positive allegations in the answer, if proved, to

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constitute a defense, the answer proposed being by a corporation and verification by the president, who it appeared from the record had no personal knowledge thereof, the defendant should have produced on the motion proof of merits. There was also used upon the motion an affidavit of one Sullivan, vessel agent, which practically added nothing to the answer, because all the material averments of it were upon information and belief. From the answer of the defendant as well as the affidavit of Sullivan it appears that the showing of merits was, as held by the court below, practically upon information and belief and not positive. A showing made upon information and belief, on application to open a default, has been held insufficient. *Superior C. L. Co. v. Dunphy,* 93 Wis. 188, 67 N. W. 428, and cases there cited; *Deering H. Co. v. Johnson,* 108 Wis. 275, 84 N. W. 426. Nor are conclusions sufficient, even though stated positively upon the knowledge of the pleader. Facts should be stated from which the court can see whether a valid defense exists. *Roemer v. Schmidt,* 134 Wis. 1, 114 N. W. 127; *Kremer v. Sponholz,* 129 Wis. 549, 109 N. W. 527. The allegations of the answer were very meager upon the facts going to the defense upon the merits, and necessarily so because of lack of knowledge on the part of the president. No affidavit of the parties who knew the facts was produced and no reason given why it was not. The affidavit of the vessel agent is upon information received from the master of the vessel, officers, and seamen, but no affidavit of the master or any seaman was produced. The allegations of the answer are quite general, simply denying negligence on the part of the defendant and alleging that plaintiff was not at the time of injury engaged as employee of defendant, and that defendant had no control over the loading of the ice. No affidavit was produced on the hearing to support the allegations of the answer as to the merits of the defense. The motion to open the judgment was addressed to the sound discretion of the trial court.

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Kremer v. Sponholz, supra; Menasha W. W. Co. v. Michelstetter, 126 Wis. 427, 105 N. W. 927; *Buchan v. Nelson,* 114 Wis. 234, 90 N. W. 114; *Rogers v. Fate,* 113 Wis. 364, 89 N. W. 186. We cannot say that such discretion was abused. A default should be opened only if the ends of justice seem to require it. *Superior C. L. Co. v. Dunphy,* 93 Wis. 188, 67 N. W. 428. The court below in its opinion filed held that the ends of justice did not require that the judgment be set aside, or that such excuse had been shown as called for the exercise of the court's discretion in defendant's favor.

We find no abuse of discretion in so ruling. Therefore the orders and judgment appealed from must be affirmed.

By the Court.—The orders and judgment appealed from are affirmed.

HIROUX, Respondent, vs. BAUM, imp., Appellant.

November 13—December 1, 1908.

Automobiles: Master and servant: Negligence of servant: Injuries to third parties: Evidence: Independent contractor: Misleading instructions: Appeal and error: Review: Harmless error: Excessive damages.

1. In an action for injuries by collision with an automobile owned by defendant but operated by defendant's son, the evidence, stated in the opinion, is *held* sufficient to support a finding that the son was acting as the father's servant.
2. In such case the fact that the son was running the automobile by authority of the father is sufficient to make a *prima facie* case of master and servant.
3. In an action for injuries by collision with an automobile owned by defendant it appeared that defendant's son was actually operating the machine, but under the instructions of a third person from whom the machine was purchased under an agreement to give the son such instructions. *Held,* that while the question as to whether or not the third person had possession

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of the automobile as an independent contractor was close, the jury were warranted upon the evidence and the legitimate inferences to be drawn therefrom in finding that the son was the agent and servant of the defendant in the operation of the automobile.

4. In an action for personal injuries the court instructed the jury that they must determine whether defendant was exercising such care as a man of ordinary prudence would exercise under similar circumstances, "and if you find he was *not*, then you will find that he was in the exercise of ordinary care." *Held*, taking the instruction in its literal sense, that it was more favorable to defendant than if the word "not" had been omitted, and was not prejudicial.

5. In an action for personal injuries by collision with an automobile, upon the evidence, stated in the opinion, it is *held* that a verdict for $1,200 damages was not excessive.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The plaintiff was at work sweeping one of the streets in the city of Green Bay, Wisconsin, and was run into and injured by an automobile owned by appellant, *John Baum.* The appellant purchased the automobile a few days before the time of the accident, and had an understanding with Mr. Lucia, one of the members of the firm from whom the machine was purchased, that he would instruct the appellant's son, Cecil Baum, to run it. At the time of the injury Mr. Lucia and Cecil Baum were out with the machine and Cecil was running it. Defendant Cecil was seventeen years of age, living with his father, who was a merchant doing business in Green Bay, and occasionally worked in his father's store. The complaint charges defendants with negligence, and that the defendant Cecil was acting as the agent and servant of the defendant *John Baum,* and that said Cecil, while in the employ and acting as the agent and servant of *John Baum,* and with his sanction and authority, drove an automobile belonging to the defendant *John Baum* carelessly and negligently and ran into plaintiff, causing the injury. The defendant *John Baum* answered by general

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denial, and the defendant Cecil answered by his guardian *ad litem,* admitting that plaintiff was employed as a street sweeper by the city of Green Bay and was at the time of the accident sweeping Main street and was thrown upon the ground in the street, and that defendant Cecil is the son of defendant *John Baum,* and denied the other allegations of the complaint. The jury returned the following verdict:

"(1) Was Cecil Baum the servant and agent of the defendant *John Baum* in running the automobile at the time the plaintiff was injured? *A.* Yes.

"(2) If you answer the first question 'yes,' then answer this: Was Cecil Baum acting within the scope of his employment while driving the automobile at the time of the injury? *A.* Yes.

"(3) Was Cecil Baum wanting in ordinary care in driving and managing the automobile prior to and at the time it struck the plaintiff? *A.* Yes.

"(4) If you answer the third question 'yes,' then answer this: Was such want of ordinary care the proximate cause of the plaintiff's injury? *A.* Yes.

"(5) If your answer to the third question should be 'yes,' then answer this: Did any want of ordinary care on the part of the plaintiff contribute to his injury? *A.* No.

"(6) What amount of money would compensate the plaintiff for his injury? *A.* Twelve hundred ($1,200) dollars."

The usual motions were made to amend the verdict, for judgment in favor of the defendant *John Baum* upon the verdict as amended, for judgment notwithstanding the verdict, and for a new trial, which motions were denied and due exceptions taken. Exceptions were also duly filed to the charge of the court to the jury. Judgment was entered in favor of the plaintiff upon the verdict, from which this appeal was taken.

For the appellant there was a brief by *Aarons & Niven,* and oral argument by *J. M. Niven.*

For the respondent there was a brief by *Kittell & Burke,* and oral argument by *J. A. Kittell.*

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KERWIN, J. The plaintiff's theory of the case upon the trial below was that Cecil Baum was the agent or servant of appellant and therefore the appellant was liable for Cecil's torts. The jury found for plaintiff upon that issue, and the question arises whether such finding has support in the evidence. It is insisted by appellant that it has not. There is evidence tending to prove that Cecil was seventeen years of age, lived with his father, occasionally worked in his father's store, but received no compensation for his services; that appellant bought the automobile from Lucia Bros. mainly upon the solicitation of his son Cecil about a week before the injury; that it was understood between appellant and Cecil that the latter should learn to run the automobile or car so purchased and teach the other members of the family to run it, or run it for their benefit; that by agreement between appellant and Lucia the latter was to teach Cecil to run the car, and it was understood, by arrangement between appellant and Cecil, that Cecil was to have the right to take the car whenever he had time and, with the aid of Lucia, learn to run it. On the day in question Cecil took the car, and at his request Lucia went with him to teach him to run it, and after going a considerable distance Lucia turned the car over to Cecil to run, and Cecil was running it at the time of the injury; that from the time of the purchase the car was owned and controlled by appellant, and at the time of the injury was in the possession of Cecil, with the consent of appellant, for the purpose of learning to operate it under instructions from Lucia. The jury would be entitled to find the foregoing facts from the evidence. If Cecil was running the car by authority from appellant, that would be sufficient to make a *prima facie* case of master and servant. *Gerhardt v. Swaty,* 57 Wis. 24, 14 N. W. 851; *Schaefer v. Osterbrink,* 67 Wis. 495, 502, 30 N. W. 922; *Davis v. Dregne,* 120 Wis. 63, 97 N. W. 512; *Stewart v. Baruch,* 103 App. Div. 577, 93 N. Y. Supp. 161. The foregoing cases are quite anal-

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ogous in principle to the one before us, and we think support the ruling of the lower court that the evidence was sufficient to warrant the findings of the jury. On the question of the agency of Cecil we are cited by counsel for appellant to *Kumba v. Gilham,* 103 Wis. 312, 79 N. W. 325; *Winkler v. Fisher,* 95 Wis. 355, 70 N. W. 477; and *Maddox v. Brown,* 71 Me. 432. In *Kumba v. Gilham, supra,* the son was clearly acting beyond the authority or direction of the father and contrary to his desire. In *Winkler v. Fisher, supra,* the son disobeyed the express instructions of the father, and was not at the time of the injury in his father's employ in any sense whatever, but was acting contrary to his instructions. In *Maddox v. Brown, supra,* the son took his father's horse on business exclusively of his own and without the knowledge of the father. The boy was in no way executing the orders of his father.

It is further insisted that Cecil was not the servant of appellant but the servant of Lucia, an independent contractor, and *Carlson v. Stocking,* 91 Wis. 432, 65 N. W. 58; *Kuehn v. Milwaukee,* 92 Wis. 263, 65 N. W. 1030; *Bauer v. Richter,* 103 Wis. 412, 79 N. W. 404; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041; *Salliotte v. King B. Co.* 122 Fed. 378, 65 L. R. A. 620; *Bailey v. Troy & B. R. Co.* 57 Vt. 252; and *King v. N. Y. C. & H. R. R. Co.* 66 N. Y. 181, are cited. We have carefully examined these cases and cannot discover that they are controlling upon the question in appellant's favor. In *Carlson v. Stocking, supra,* there was evidence that one Frazer had full control of the dam and drive of logs in question, that he employed all the men and furnished the supplies, and that the defendants were merely to pay him a compensation for driving their logs, the defendants participating in raising the dam and operating the same in making the drive at the time in question, and it was held that whether Frazer was an independent contractor was a question for the jury. In *Smith v. Milwau-*

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kee B. & T. Exch., contractors had agreed to erect a building according to fixed plans and specifications, and it was held they were independent contractors, although the owner reserved the right of inspection. In *Kuehn v. Milwaukee, supra*, one who had a contract with the city to remove garbage, with no right on the part of the city to control the mode or manner of performance of the contract, was held to be an independent contractor, although the city had the right to relet the contract in case of "improper or imperfect" performance. Other authorities cited by appellant under this head are similar in principle to the foregoing.

The case before us turns upon whether or not Cecil was at the time of the injury in possession of and operating the car as servant of appellant, or whether Lucia had possession of it as an independent contractor. While we regard the question close, we have arrived at the conclusion that the jury was warranted upon the evidence and the legitimate inference to be drawn therefrom in finding that Cecil was the agent and servant of appellant in the operation of the car, and therefore cannot disturb the verdict upon that point.

2. Error is assigned upon the following portion of the charge:

"Now, if you are satisfied from all the circumstances of this case—you must take into consideration just what the young man was doing, what experience he had had, and what he knew about operating the machine, and what was on the street, everything that he saw or knew, and everything that he should, in the exercise of ordinary care, have seen or known, and determine just what he did, and just what happened, and determine whether he was exercising at the time such care as men of ordinary care and prudence would exercise under the same and similar circumstances, and if you find he was not, then you will find that he was in the exercise of ordinary care, in answer to this question."

It is very obvious that the use of the word "not," which made the portion excepted to read, "and if you find he was

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not in the exercise of ordinary care," was clearly a slip in the use of the word "not" which the learned trial judge did not intend, and must have been so understood by the jury. This we think would be apparent to any juror of average intelligence from the connection in which the word "not" was used, as well as viewing the portion of the charge excepted to together with the balance of the charge. Besides, it will be seen that, taking this portion of the charge in its literal sense, it was more favorable to the appellant than if the word "not" had been omitted. A case in point is *Binns v. State,* 66 Ind. 428. Without further pursuing the subject, we are of opinion that there was no prejudicial error in the charge. *Hoffman v. Rib Lake L. Co.* 136 Wis. 388, 117 N. W. 789; *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 805; *Kiekhoefer v. Hidershide,* 113 Wis. 280, 288; *Pelton v. Spider Lake S. & L. Co.* 132 Wis. 219, 112 N. W. 29; *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 117 N. W. 1007; *Butler v. State,* 102 Wis. 364, 78 N. W. 590.

3. It is also contended that the damages, $1,200, awarded are excessive. We would be better satisfied, upon the facts of the case as disclosed by the evidence, with a smaller verdict. The court below refused to disturb the verdict, and the question arises whether we can reverse it because a new trial was not granted on account of excessive damages. It is true the actual expenses incurred by the plaintiff in consequence of the injury were small, the appellant paying the doctor's bill. The plaintiff is about sixty-three years of age and the injuries did not at first appear to be of a serious character. The principal injuries complained of were to the head and hip. The evidence of the doctors who examined him is quite strong to the effect that they were unable to find any physical injury to the hip and were obliged to rely upon plaintiff's statements, conduct, and behavior, nothing being observable of any consequences except a scalp wound, which healed in a short time. There is evidence, however,

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tending to show that the machine was going eight or nine miles an hour; that plaintiff when struck was knocked down and rendered unconscious; that he had not at the time of trial recovered from the injuries, was unable to work, and suffered considerable pain; did not rest well for three weeks after the injury; was earning $1.50 per day when injured in July, and the case was tried in December, 1907. One doctor who made an examination two months before the trial found tenderness in the scalp wound, also soreness in hip which he thought would be permanent, and that the injuries complained of could have been received without leaving any external evidence of them; that the conditions he found came from the injuries received by plaintiff when struck by the car; that the result of an operation for relief of the scalp injury would be uncertain, and that plaintiff's head was permanently injured, and soreness continued in the hip and back. From a careful examination of the evidence we do not feel that this court would be justified in holding that the damages awarded by the jury are excessive. *Duffy v. C. & N. W. R. Co.* 34 Wis. 188; *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, 67 N. W. 721, and cases cited. It follows that the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

CHANDLER LUMBER COMPANY, Respondent, vs. FEHLAU, imp., Appellant.

September 30—December 15, 1908.

Mechanics' liens: Notice by subcontractor: Sufficiency: Description of material: Designation of amount due.

1. A compliance with the provisions of sec. 3315, Stats. (1898), is a condition precedent to the right of lien by a subcontractor, and it is essential that the notice provided for therein contain all the features indicated by that section.

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2. A statement in the notice given by a subcontractor claiming a lien under sec. 3315, Stats. (1898): "Materials furnished: Lumber and mill work to the value of $1,100," while meager and not to be commended, is *held* to be a compliance with that section.
3. A clause in the notice, "that the undersigned has furnished such materials, pursuant to such employment, to the amount and value of $1,100," does not satisfy the call of sec. 3315, Stats. (1898), which in express terms requires the notice to state the amount due. Such requirement cannot be supplied by inference.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from an order overruling the demurrer of the appellant to the plaintiff's complaint. The action was brought to foreclose a lien claimed by respondent, *Chandler Lumber Company,* for lumber and mill work to the value of $1,100 alleged to have been furnished by it to the defendant H. Schutte, principal contractor, for the construction of a dwelling house for appellant.

For the appellant there was a brief by *Gilbert, Jackson & Ela,* and oral argument by *Russell Jackson.*

For the respondent there was a brief by *Bashford, Aylward & Spensley,* and oral argument by *R. M. Bashford.*

The following opinion was filed October 20, 1908:

KERWIN, J. The only question for consideration upon this appeal is the sufficiency of the notice of lien involved, which is as follows:

"Notice is hereby given to *Gustav Fehlau,* the owner of the property to be affected by the lien herein mentioned, that the undersigned, the *Chandler Lumber Company,* a corporation organized and existing under the laws of the state of Illinois, with its principal place of business in the city of Chicago, Illinois, subcontractor of H. Schutte, principal contractor, for furnishing the materials hereinafter mentioned, claim the lien given by chapter 143 of the Revised Statutes of Wisconsin, and the acts amendatory thereof,

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upon the premises and lands hereinafter particularly described and upon the dwelling house thereon situate. That the undersigned was employed by said H. Schutte, contractor, to furnish the materials, hereafter particularly stated, upon the property hereinafter described, and the dwelling house situated thereon. That the undersigned has furnished such materials, pursuant to such employment, to the amount and value of eleven hundred ($1,100) dollars, upon the said property and dwelling house situated thereon. That the following is a particular statement of said materials furnished by the undersigned, pursuant to such employment, to the value of:

"Materials Furnished.—Lumber and mill work to the value of eleven hundred dollars.

"The property to be affected by said lien is described as follows, to wit: lot seven (7) in block ten (10) in Hudson Park in the town of Blooming Grove, according to the recorded plat thereof, all in the county of Dane and state of Wisconsin."

The appellant contends that the notice is deficient and not in substantial compliance with the statute, for the reasons (1) that it does not contain a sufficient statement of the material alleged to have been furnished; and (2) that it fails to state the amount due plaintiff from Schutte, the principal contractor. Sec. 3315, Stats. (1898), requires the person furnishing the material to the contractor to give notice in writing to the owner, setting forth, among other things, "a statement of the labor performed or the materials furnished, the amount due therefor from such principal contractor." This court has held that compliance with this section of the statute is a condition precedent to the right of lien by a subcontractor, and that it is essential to the notice provided for that it "contain all the features indicated by such section." *Laev L. Co. v. Auer,* 123 Wis. 178, 101 N. W. 425; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74. It is insisted by appellant that the "statement" mentioned in the statute means a reasonable bill of items, and a long line

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of authorities is cited in support of this contention. Many of these cases are based upon statutes quite different from our own, and, while some of them tend to support appellant's contention, others may be found, some of which are cited by respondent, which give a more liberal construction to such statutes. The object of the notice required by our statute to be given by the subcontractor is to enable the owner to protect himself by withholding the amount claimed from the principal contractor. *Mark Paine L. Co. v. Douglas Co. Imp. Co.* 94 Wis. 322, 324, 68 N. W. 1013. A general statement of the material furnished has been held sufficient. *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136; *Brooks v. Railway Co.* 101 U. S. 443. While we think the statement of materials furnished is meager and not to be commended, we cannot say that it is not a compliance with the statute requiring a statement of the materials furnished.

Upon the second point of objection to the notice, however, we have had much trouble. The statute in express terms requires the notice to state the amount due. There is no express statement in the notice that any amount is due. In *Laev L. Co. v. Auer, supra,* this court seems to have recognized the necessity of stating in the notice the amount due. The court said:

"If it sets forth the facts that he was employed to furnish, and that he did furnish, material as specified for the erection and construction of the building, with the amount due from the principal contractor, the terms and conditions of the statute are fulfilled. The purposes of this statute are twofold: First, to secure payment to persons who furnish material or perform labor upon the structures therein mentioned; and second, to apprise the owner that a claim therefor is made for the amount due for such labor or material."

And in *Security Nat. Bank v. St. Croix P. Co., supra,* it is said that "unless a notice containing the statutory requirements was served . . . the lien was lost." The clause

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in the notice "that the undersigned has furnished such materials, pursuant to such employment, to the amount and value of eleven hundred dollars" cannot be said to satisfy the call of the statute, which in plain and unambiguous terms requires the amount due to be stated. This requirement cannot be supplied by inference. *Freeman v. Rinaker,* 185 Ill. 172, 56 N. E. 1055. It follows, therefore, that the notice was not in compliance with the statute, hence the order appealed from must be reversed.

By the Court.—The order appealed from is reversed, and the action remanded for further proceedings according to law.

A motion for a rehearing was denied December 15, 1908.

HILLIARD, Respondent, vs. WISCONSIN LIFE INSURANCE COMPANY, Appellant.

October 1—December 15, 1908.

Evidence: Presumptions as to continuance of life and matrimonial relations: Parties: Real party in interest: Actions: Premature commencement: Existence of cause of action: Preliminary conditions: Pleading: Issues raised by general denial: Proof: Life insurance: Surrender of policy: Recovery of surrender value: Conditions precedent: Cause of action: Policy payable to married woman: Right of husband to surrender: Appeal and error: Conditional reversal.

1. The existence of a personal relation or a state of things being once established by proof, the presumption is that such relation or state of things continues to exist as before until the contrary is shown or until a different presumption is raised from the nature of the subject in question.
2. The foregoing rule applies to an established condition as to life and matrimonial relations.

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3. The rule that an objection that a suit was not brought by the real party in interest must be raised by demurrer or special pleading of the facts does not apply when the plaintiff has no interest, legal or equitable, in the claim or right to represent it.
4. The rule that an objection that the action was prematurely brought must be raised by demurrer or answer specially pleading the facts applies only where the cause of action was complete before suit but there was nonperformance of some condition of its being remediable, not to where there was no such cause at the beginning. In the latter situation the objection may be raised, as in any other case of there being insufficient facts pleaded or established to make out a cause of action.
5. The fact that no cause of action existed at the time of the commencement of the suit may be established under a general denial.
6. Any fact which the plaintiff must prove to establish his cause of action may be disproved under a general denial.
7. In case of a policy of life insurance providing that it shall have a surrender value upon specified conditions, a cause of action to recover such value does not exist in advance of such performance.
8. A policy of life insurance on the life of a married man, unqualifiedly payable at maturity to his wife, is governed by sec. 2347, Stats. (1898); but one so made payable but conditioned that in a specified event it shall have a surrender value in which the beneficiary shall have no interest, is not as to such feature controlled by such statute.
9. In case of a judgment being improperly rendered because the cause of action alleged did not exist when the action was commenced, and the infirmity can be cured, the result of the trial should not be disturbed except in so far as to prevent any substantial prejudice to the adverse party.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The claim in the case was this: April 28, 1897, plaintiff obtained from the Natural Premium Mutual Life Insurance Company, a corporation duly authorized in the matter, an annual twenty-payment life insurance policy, securing to his wife, Julia Hilliard, in case of her surviving him, $1,000, or in the event of her not so surviving and his decease leaving

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children such sum to such children, otherwise the same to his personal representative. It provided for a payment of $162.09 as a surrender value at the end of ten years in case of the policy being kept alive till that time, contingent upon its surrender for cancellation and sixty days' notice in writing being given to the company. December 5, 1906, plaintiff gave defendant such notice, but it failed and refused and on further notice and demand still refuses to pay said sum or any part thereof. He tendered defendant the policy before the commencement of this action and has kept such tender good. By contract with the company named in the policy and subsequent assent of the assured, prior to 1899, all the liabilities under such policy devolved upon the defendant. There was an appropriate prayer for judgment. The defendant answered by a general denial and pleaded the terms of the contract. The giving of notice as alleged was admitted. There were further allegations presenting the question as to whether the surrender value was not less than that claimed by about one half.

The cause was tried by the court without a jury. The policy of insurance contained this provision: "It is understood, that in the event of the surrender of this policy, the beneficiary hereunder shall have no claim whatever upon the said company."

The court found as matters of fact the issuance of the policy, the creation of liability and surrender value at the end of the tenth year, as alleged in the complaint, and further found that the defendant company was solvent and had in hand funds available for and applicable to payment of such value, and ordered judgment in plaintiff's favor therefor with interest as prayed for in the complaint. Judgment was accordingly rendered.

A. R. Bushnell, for the appellant.

Charles N. Brown, for the respondent.

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The following opinion was filed October 20, 1908:

MARSHALL, J. The grounds upon which judgment was rendered in favor of respondent are untenable, as the following will clearly indicate.

It was assumed by the trial court that the policy was the sole and separate property of respondent's wife, when issued, but since there was no affirmative proof that she was alive at the time of the trial or if so that she was still respondent's wife, the original situation was immaterial to his right to recover. Manifestly, those were not matters for appellant to maintain by evidence in the absence of proof to the contrary. By principles too familiar to require more than a mere statement thereof, the continuance of life and status as regards Julia Hilliard, the beneficiary named in the policy, is presumed till the presumption is rebutted by evidence. The case in this regard falls within the rule in *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 88 N. W. 587:

"When the existence of a person, a personal relation, or a state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question."

It was error to hold, as was done, that, assuming the cause of action, if there were one, belonged to respondent's wife, the proceeding in his name to enforce it was a mere failure to follow the command of the Code requiring all actions to be prosecuted in the name of the real party in interest. The purpose of the requirement was to change the rule of the common law under which it was necessary, in some cases, to prosecute in the name of one though the avails of the litigation would belong to another, as for instance the assignee of a nonnegotiable promissory note, though in equity the absolute

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owner thereof, in case of necessity to judicially enforce it at law, was compelled to do so in the name of the assignor. The change has no reference to a situation where a person who does not act in a representative capacity nor have any legal or equitable title to the cause of action; a mere pretended owner, sues to enforce the cause of action. In such a situation the infirmity of plaintiff's position goes to the very foundation of the claim of right. If it is put in issue by a denial the burden is upon him to establish it. The fact showing such infirmity is not matter in abatement nor new matter required, in order to be available, to be pleaded specially. The general rule under the Code is that any matter of fact alleged in the complaint which the plaintiff must establish to make out his cause of action may be disproved under a general denial. *Timp v. Dockham,* 32 Wis. 146; *Wheeler v. Billings,* 38 N. Y. 263; *Greenfield v. Mass. Mut. L. Ins. Co.* 47 N. Y. 430; *Weaver v. Barden,* 49 N. Y. 286; 1 Ency. Pl. & Pr. 817. That rule manifestly includes proof that the alleged cause of action never existed. *Mack v. Burt,* 5 Hun, 28; *Goddard v. Fulton,* 21 Cal. 430. It is thus tersely stated in *Greenfield v. Mass. Mut. L. Ins. Co., supra:*

"Under a general or specific denial of any part of a complaint, which plaintiff is required to prove to maintain his action, defendant may give evidence to disprove it."

It follows under the pleadings that it was essential for plaintiff to prove he owned the right claimed at the time the action was commenced.

By the terms of the policy, in order to impress thereon a surrender value, it was necessary to deliver back the instrument and give sixty days' notice in writing to the company. While the evidence shows the giving of notice to appellant, substantially informing it more than sixty days before the commencement of the action of appellant's intention to make the surrender and realize the advantages of the agreement as to a surrender value, there was no proof of such a surrender

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before the action was commenced nor thereafter. Though the policy was produced upon the trial and offered in evidence, it was not then tendered to appellant nor deposited with the court for its use. For aught that appears in the record respondent or his wife now has the policy. So in any event no cause of action existed against appellant when these proceedings were instituted. The difficulty is not in the mere failure to satisfy some condition precedent to a remedy for the enforcement of an existing cause of action, but in failure to comply with a condition precedent to the existence of the cause of action. The former would be mere matter in abatement but the latter clearly not. The distinction is pointed out in *Lombard v. McMillan,* 95 Wis. 627, 70 N. W. 673. Caution is there suggested to avoid going astray by reason of the general statement in 1 Ency. Pl. & Pr. 22, to the effect that the objection that the action is prematurely brought must be raised as matter in abatement, and similar language in *Collette v. Weed,* 68 Wis. 428, 32 N. W. 753, and other cases, overlooking *Millett v. Hayford,* 1 Wis. 401, and *Noonan v. Bradley,* 9 Wall. 394, and similar cases, to the effect that the objection that the action was prematurely brought may be made by pleading the same in abatement or by a motion for nonsuit upon the trial; that it is not waived by failure to specially plead it. This court endeavored to make clear that the two classes of authorities will be seen to be in harmony when it is appreciated that one deals with matter going to the jurisdiction of the court or the cause of action itself, and the other merely to the remedy by way of qualification or otherwise.

If, in any view of the case, the errors committed in respect to nonsurrender of the policy before the commencement of the action being mere matter in abatement and waived because such nonsurrender was not specially pleaded, could be regarded as nonprejudicial, it would be difficult to see why the judgment appealed from should be disturbed. True, un-

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der sec. 2347, Stats. (1898), as construed by this court in *Ellison v. Straw,* 116 Wis. 207, 92 N. W. 1094, and *Canterbury v. N. W. Mut. L. Ins. Co.* 124 Wis. 169, 102 N. W. 1096, if a married man takes out a policy of life insurance expressed to be for the benefit of his wife, it is her property to the extent that in case of maturity of the contract during her lifetime the proceeds thereof will belong to her for her own use and benefit free from any claim on the part of her husband or any of his creditors. It was assumed by the trial court, as before indicated, and is now assumed by counsel upon both sides, that the policy here is unqualifiedly within that statutory rule. All seem to have overlooked this provision of the contract:

"It is understood, that in the event of the surrender of this policy, the beneficiary hereunder shall have no claim whatever upon said company."

We see no way of escaping the conclusion that such language should be read as a proviso to the clause making the policy payable to Mrs. Hilliard and, therefore, in that respect the contract is not within the statute, if it be competent to make such a proviso. Upon principle there is certainly no such incompetency and there is no prohibition in respect to the matter, express or implied, in the written law, so far as we can discover. Possibly to incorporate such a provision in a contract which would otherwise be governed by the plain letter of the statute, is contrary to the legislative policy in respect to the rights of married women as to insurance contracts made for their benefit, but if liberty of contracting in respect to such matters can legitimately be taken away the restriction should be unmistakably expressed.

It must follow, as we view the matter, that under the terms of the policy the right to mature a claim for a surrender value is personal to respondent. If any one can recover on the claim made in the complaint respondent is that one.

We must still face the fact that when this action was

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commenced it was not grounded on a matured claim. There was a mere right on the part of respondent to create one by complying with the conditions of the contract in that regard. The findings of the trial court do not cover the subject. The basic fact, essential to the existence of a surrender value; the actual surrender of the contract with sixty days' notice to the company, or at least such notice and an exhaustion of all reasonable efforts to so surrender the policy, was passed over by the trial court, seemingly, as immaterial. So on the face of the findings they do not support the judgment and no better support is found in the evidence. As the case stands, notwithstanding nonperformance of conditions requisite to impress upon the policy a surrender value, and no delivery of the policy into court for the use of appellant, a recovery was allowed and not even conditioned upon delivery of the policy to appellant or into court for its use, as before indicated.

It is the personal opinion of the writer that, in harmony with the law governing such situations as is here presented, the orderly way to dispose of this case is to reverse the judgment and remand the cause for dismissal with costs in favor of appellant. However, it is the opinion of the court that since the notice, seasonably given, fully informed appellant that respondent intended to surrender the policy and the commencement of the action was an unmistakable election to efficiently stand by such intention, and the attitude of appellant from first to last shows that it would not under any circumstances have paid a surrender value to respondent without judicial coercion, but have insisted, as it did under the circumstances which in fact occurred, that the policy could not be surrendered without consent of Mrs. Hilliard, or satisfactory proof being given of her right having been extinguished by death or otherwise, the errors which resulted in the judgment are not really prejudicial to appellant, unless it is excessive or because it was not conditioned upon a

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surrender of the policy to appellant, or into court for its use. Therefore the court entertains the opinion that the situation is analogous to failure to make a tender or a demand when the same is a condition precedent to the maintenance of an action and it clearly appears that a tender would not have been accepted or demand been complied with. On the whole, it is the opinion of the court that the situation should be governed by the rule that "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Doubtless justice can be best promoted by giving the fullest effect which the court reasonably can to that beneficent statute, to the end that justice between litigants may be attained as speedily and economically as practicable. It has often been said here in terms or effect that regardless of how many errors may appear in proceedings resulting in a judgment, challenged upon appeal, and regardless of how plain or inexcusable such errors may appear, the judgment should not be disturbed except in so far as it may appear that the opposite party was or probably may have been prejudiced by such errors. I would personally vindicate the correctness of that rule by applying it in judicial work with the greatest practicable freedom. I would hesitate in this case, in that its application would seem to take from a party the benefit of objections legitimately made upon the trial and persisted in till this time, which had they been allowed would have been to his advantage in that it would have terminated the pending litigation in its favor instead of its being mulcted in the particular instance in costs. It seems by the trend of our decisions that is prejudice within the meaning of the statute. However, 'tis true that it is quite apparent appellant would never have paid the surrender value claimed without litigation attended with costs to the same extent as it will be bur-

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dened in case a recovery should be now permitted. In that sense I fully agree that failure of the court to give appellant the advantage of the objections going to the infirmity of respondent's claim, in that the action was prematurely brought, has caused it no substantial injury.

A question is raised as to the amount of the surrender value of the policy, under any circumstances, at the time the action was commenced. In our judgment that is plainly fixed by the terms of the contract at the amount claimed by respondent. The language of the policy is very plain, that upon the performance of the specified conditions to which we have referred it shall have a surrender value of $162.09.

In harmony with what has been said it is the opinion of the court that a disposition of the appeal as indicated in the mandate will effectually cure, so far as any substantial injustice is concerned, all errors committed upon the trial.

By the Court.—The judgment is reversed, and the cause remanded with directions to order judgment in plaintiff's favor as prayed for in the complaint, conditioned upon his delivering the policy to defendant within thirty days after the filing of the *remittitur* in the trial court, or within such time depositing it with the clerk of such court for the defendant and notifying it thereof, and in case such condition shall not be performed within such thirty days, then to render judgment in appellant's favor dismissing the cause with costs.

Upon a motion by the appellant for a rehearing there was a brief by *A. R. Bushnell,* appellant's attorney, and a brief in opposition by *C. M. Hilliard,* respondent, in person.

The motion was denied December 15, 1908. WINSLOW, C. J., took no part.

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CLARIDGE, Appellant, vs. EVANS, Trustee, Respondent.
EVANS, Trustee, Respondent, vs. CLARIDGE, Appellant.

October 1—December 15, 1908.

Bankruptcy: Preference: Mortgages: Foreclosure: Property and rights of trustee in bankruptcy: Setting aside mortgage: Appeal and error: Review: Inconsistent findings, which controls: Debtor and creditor: "Reasonable cause to believe that a preference was intended."

1. An action to foreclose a mortgage was defended on the ground that the mortgage was void as a preference under the federal bankruptcy act. It appeared, among other things, that the mortgage was given about two years before the petition in bankruptcy was filed, to one who was a managing officer of the bankrupt but not at the time a creditor, for the purpose of securing advances agreed to be made in order to enable the bankrupt to continue business; that the bankrupt was then in fact insolvent, as both parties knew, but the mortgage was made in good faith and both parties expected the business would be successfully carried on; that by innocent mistake the mortgage was not recorded until a few days before the bankruptcy proceedings, although the mortgagee supposed it was, and made his advances from time to time relying on his security; that the last two advances were made before the beginning of the four-months period immediately preceding the bankruptcy proceedings, and that for those advances foreclosure was claimed. *Held:*

(1) In the absence of fraud, actual or constructive, such mortgage, though unrecorded, gave to the mortgagee a lien upon the mortgaged property for the sums thereafter advanced under it, good as between the parties and as to all the world except subsequent purchasers or mortgagees in good faith and for a valuable consideration.

(2) The trustee in bankruptcy had no greater right to set aside the conveyance or transfer than the bankrupt himself had, except so far as the bankruptcy act empowered him to avoid such transactions in cases of actual or constructive fraud or in cases of preferences inhibited by the act.

(3) Under subd. *a* and *b*, sec. 60, and subd. *d*, sec. 67, of the federal bankruptcy act of 1898, the creditor was entitled to judgment of foreclosure.

SIEBECKER and KERWIN, JJ., dissenting, are of the opinion that the mortgage constituted a preference and hence was fraudulent and void under the federal bankruptcy act.

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2. The giving of a mortgage or other security to secure the repayment of a present loan, or a loan to be made in the future, is not a preference. In order to constitute a preference there must be an existing antecedent debt upon which a payment is made or for which security is given. A security given for a debt created at the time is a present security and not a preference created by the mortgage.
3. A preference contemplates a class of existing creditors, one of whom is singled out for preference.
4. The word "preference" means that one person is favored above others who before the favor was shown stood on equal footing.
5. The concluding clause of subd. *a*, sec. 60, of the federal bankruptcy act, which in effect declares that, if the local law requires recording of the transfer, the four-months period during which preferences are inhibited shall not expire until four months after the date of the recording, does not define a preference nor purport to make a preference out of a transaction which was not a preference before, and only applies where the transfer itself constitutes a preference.
6. Where a debtor, when the four-months period under subd. *a*, sec. 60, of the federal bankruptcy act began, owed the creditor $5,000, and the creditor's security was only of the value of $1,725, as to the sum of $3,275 the creditor was unsecured, and he could not, with knowledge of his debtor's insolvency, retain a payment on his unsecured debt within the four-months period, where this would give him a greater percentage than any other unsecured creditor.
7. In such case the debt of the creditor, after exhausting his security, became of the same class as all other unsecured contract debts which are not given priority by the terms of the bankruptcy act.
8. A specific finding directed to the special question of the time of payment of specific notes is *held* controlling over the mere recapitulation of these notes with others contained in another finding.
9. Where a creditor was the active manager of the entire business of a bankrupt corporation from the time he accepted a mortgage securing him for advances to be made, up to the time of the bankruptcy, and in fact was the only person who had personal and accurate knowledge of its affairs, and, as secretary, in fact made the alleged preferential payments to himself, the creditor was in effect both debtor and creditor, and whatever he knew in one capacity he knew in the other.
10. In such case it appeared, among other things, that the complete and practically hopeless insolvency of the corporation was known to the creditor when he made payments to himself, and

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he also knew that the effect of each payment was to enable him, as a creditor, to obtain a greater percentage of his debt than other creditors of the same class. *Held*, under subd. *a*, sec. 60, of the federal bankruptcy act, prescribing that a preference within the terms thereof is recoverable when the creditor shall have reasonable cause to believe that a preference was intended, that the creditor must be deemed to have known that all the facts existed which were necessary to condemn the payments as preferential and as so intended.

11. In such case it is *held* that the omission of any finding to the effect that the creditor had reasonable cause to believe that a preference was intended when the payments were made is not ground for reversal of a judgment in favor of the trustee in bankruptcy for the recovery of such preference.

APPEALS from judgments of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Reversed on one appeal; affirmed on the other.*

These actions involved the same transactions and were tried on the same testimony. The first action was brought upon leave, duly obtained, to foreclose a mortgage upon real estate given to *Claridge* by the Clover Creamery Association, a bankrupt corporation, and the second was brought by the trustee of the bankrupt to recover payments made by the association to *Claridge* before the bankruptcy. Both transactions were claimed by the trustee to be unlawful preferences under the provisions of the bankrupt law. The actions were tried by the court and the facts were not materially disputed, being found by the trial court substantially as follows: For some time prior to December, 1904, the Clover Creamery Association was a corporation doing business in Sauk county, and continued to transact business up to October 25, 1906, when a petition in bankruptcy was filed in the proper federal court by creditors, and on February 18, 1907, it was adjudged a bankrupt, and the respondent, *Evans,* appointed trustee. On December 16, 1904, it was in fact insolvent, being largely indebted to its patrons and also to the Bank of Reedsburg upon notes and overdrafts, and the bank was unwilling to extend further credit. *Claridge* was then secretary

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of the corporation and knew of its insolvent condition. On the last-named date it was agreed between *Claridge* and the directors of the company in good faith that *Claridge* should advance to the company not exceeding $4,000, in sums as needed, to discharge its indebtedness, and should take the note of the company for that sum, running three years, secured by a mortgage upon the real estate of the company, the note and mortgage to be continuing securities. By this agreement *Claridge* was to give his own personal notes to the bank from time to time as needed, the proceeds to be placed to the credit of the company, and the notes so given to be paid by the company out of its moneys in the bank as fast as practicable. The $4,000 note and mortgage were duly executed and delivered by the company to *Claridge* on the day last named. Thereafter, and in reliance on this note and mortgage, *Claridge* gave his notes to the bank at various times during the years 1904 and 1905 for various sums, the proceeds of which notes were credited to the company and paid out of the funds of the company in the bank prior to June 25, 1906, and no question is raised as to the validity of such payments in these actions. Two notes of $1,000 and $1,500, respectively, fell due June 1, 1906. The first of these notes was paid out of the funds of the company in the bank, by a check drawn by *Mr. Claridge* as secretary, June 29, 1906, and the second was paid in the same way August 25, 1906. Two other notes placed in the bank by *Claridge* to the credit of the company, one dated January 16, 1906, for $1,000, and one dated April 2, 1906, for $1,500, also fell due June 1st, but neither of them was ever paid by the company. Both were paid by *Claridge* December 24, 1906, and the foreclosure action is brought to enforce a mortgage lien for these sums. Upon receiving the mortgage on December 16, 1904, *Claridge* gave it to Mr. Gottry, a reputable attorney of Reedsburg, to place the same on record at Baraboo, and paid him the recording fees. Mr. Gottry, however, by oversight mislaid the mortgage, and for-

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got its existence until by chance he found it among his papers October 19, 1906, when he immediately caused it to be recorded. At this last-named date the company was insolvent and in financial difficulties, to the knowledge of *Claridge* but not to the knowledge of Gottry, and Gottry had no intention of gaining a preference for *Claridge* when he recorded the instrument. *Claridge* did not know of Gottry's failure to promptly record the mortgage and always supposed it had been promptly recorded. The company was insolvent at all times within the period of four months next preceding the filing of the petition in bankruptcy on October 25, 1906. The mortgaged property was sold by the trustee free of incumbrance, by order of the bankruptcy court, for the sum of $1,725, which is in the hands of the trustee, and that court by order permitted the bringing of the foreclosure action against this fund with the same effect as if brought against the mortgaged property. Upon these facts the court held in the foreclosure action that the mortgage was a preference and void under the bankrupt law, and in the preference action held that the trustee was entitled to recover, as preferential payments, the amounts paid out of the funds of the company to take up the two notes before mentioned on June 29 and August 25, 1906, respectively, as well as the sum of $50.24 which was paid to *Claridge* on the 25th of October, 1906, for cream sold by him to the company in August, amounting in all to $2,573.79. Judgments being entered in accordance with these findings, *Claridge* appeals in both cases.

For the appellant there were briefs by *Tenney, Hall & Tenney,* and oral argument by *F. W. Hall.*

For the respondent there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.*

The following opinion was filed October 20, 1908:

WINSLOW, C. J. In the foreclosure action the question is whether the mortgage of December 16, 1904, is void as a

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preference under the provisions of the bankrupt act. The mortgage was given nearly two years before the petition in bankruptcy was filed, to one who was not at the time a creditor of the company, and for the purpose of securing advances which the mortgagee agreed to make to enable the company to continue its business. The company was then in fact insolvent, as both parties knew, but the mortgage was made in good faith and both parties expected that the business would be successfully carried on. By innocent mistake the mortgage was not recorded until a few days before the bankruptcy proceedings, although the mortgagee supposed it was, and made his advances from time to time relying on his security. The last two advances were made before the beginning of the four-months period immediately preceding the bankruptcy proceedings, and for these advances foreclosure is claimed.

There can be no doubt that, in the absence of fraud, actual or constructive, this mortgage, though unrecorded, gave to the mortgagee a lien upon the mortgaged property for the sums thereafter advanced under it, good as between the parties and as to all the world except subsequent purchasers or mortgagees in good faith and for a valuable consideration. Secs. 2203, 2209, 2241, 2242, Stats. (1898); *Mathwig v. Mann,* 96 Wis. 213, 71 N. W. 105; *Wis. P. M. Co. v. Schuda,* 72 Wis. 277, 39 N. W. 558. It is familiar law that the trustee in bankruptcy takes the bankrupt's property subject to all the equities impressed upon it in the hands of the bankrupt, unless otherwise provided in the bankrupt act. In other words, he has no greater right to set aside conveyances or transfers than the bankrupt himself had, except in so far as the bankrupt law empowers him to avoid such transactions in cases of actual or constructive fraud or in cases of preference inhibited by the act. *Security W. Co. v. Hand,* 206 U. S. 415, 27 Sup. Ct. 720; *Eastman v. Parkinson,* 133 Wis. 375, 113 N. W. 649. No actual or constructive fraud

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is claimed in the present case, but the only claim is that the mortgage constituted a preference within the meaning of subd. *a* and *b* of sec. 60 of the national bankruptcy act of 1898 (Act July 1, 1898, ch. 541, 30 U. S. Stats. at Large, 562, U. S. Comp. Stats. 1901, p. 3445), as amended by the act of February 5, 1903 (ch. 487, sec. 13, 32 U. S. Stats. at Large, 799, U. S. Comp. Stats. Supp. 1907, p. 1031). Sec. 60*a* provides that:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

Subd. *b*, sec. 60, provides that:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The mortgagee here knew that the company was insolvent at the time the mortgage was given as well as at the time it was recorded, and the trustee claims that, though it was given nearly two years before the bankruptcy proceedings were commenced, still, because it was not recorded until a few days before the petition was filed, it becomes a voidable preference by virtue of the last clause of subd. *a*, sec. 60. The fundamental difficulty with the trustee's contention is that the sections deal with *preferences* alone, not with all business transactions, and the giving of a mortgage or other

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security to secure repayment of a present loan, or a loan to be made in the future, is not a preference. In order to constitute a preference there must be an existing antecedent debt upon which a payment is made or for which security is given. A security given for a debt created at the time is a present security and not a preference created by the mortgage. This seems clear from the language of the sections as well as from consideration of the evil intended to be averted thereby. A preference, as defined by the statute, is a transfer which will enable any one of the insolvent's *creditors* to obtain a greater percentage of his debt than other *creditors* of the same class. It contemplates a class of existing creditors, one of whom is singled out for preference. The evil which was to be averted was the diminution of the bankrupt's estate by a transfer to a favored creditor to the detriment of other creditors of the same class. The idea of the bankrupt law is that the bankrupt's whole estate should go to the benefit of all his creditors equally, except as priority of certain kinds of claims may be provided for by the act, and that hence the bankrupt should not be allowed to diminish the common fund within four months before his bankruptcy by giving a preference to one creditor who has reason to believe that insolvency exists. When, however, a mortgage is given for a present loan of money to go into the bankrupt's business, there is no diminution of the estate. Indeed, that very act may amount to a practical enlargement of the estate and enable the insolvent to rescue his business from threatened ruin, and thus save all his creditors from loss. Thus Judge DILLON well said in *Darby's Trustees v. Boatman's Sav. Inst.* 1 Dill. 141, Fed. Cas. No. 3,571, under the old bankrupt law (which also contained provisions condemning preferences):

"An insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money and give *at the time* security therefor, provided always the transaction be free from fraud in fact and

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upon the bankrupt act; and hence it is a settled principle of bankrupt law, both in England and in this country, that advances, made in good faith to a debtor to carry on business upon security taken at the time, do not violate either the terms or policy of the bankrupt act."

This principle is definitely laid down and approved in the cases of *In re Wolf,* 98 Fed. 74; *In re Clifford,* 136 Fed. 475; *First Nat. Bank v. Pa. T. Co.* 124 Fed. 968, and *In re Noel,* 137 Fed. 694, and in effect in *Rogers v. Page,* 140 Fed. 596. In the *Noel Case* the court said: "As to the question of preference under the bankrupt act, it is clear that a present loan on security is not a preference"—citing sec. 67, subd. *d* (Act July 1, 1898, ch. 541, 30 U. S. Stats. at Large, 565, U. S. Comp. Stats. 1901, p. 3449), of the bankrupt act, which reads as follows:

"Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

The very word "preference" means that one person is favored above others who before the favor was shown stood on equal footing. Bouvier defines it as "the paying or securing, to one or more of his creditors, by an insolvent, the whole or part of their claim to the exclusion of the rest." This seems entirely clear, and probably there would have been no attack on the mortgage were it not for the concluding clause of subd. *a,* sec. 60, which in effect declares that if the local law requires recording of the transfer, the four-months period during which preferences are inhibited shall not expire until four months after the date of the recording. But this clause does not define a preference, nor purport to make a preference out of a transaction which was not a preference before. It only applies where the transfer itself constitutes a preference. In order to ascertain what a preference in

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fact is, we must go to the first part of the section, which, as we have seen, defines it in accordance with the natural meaning, namely, a transfer to one creditor out of a class. So we are not concerned here with the last clause, because it only refers to preferences, and there has been no preference to which it can apply. The construction of this last clause, especially with regard to the scope of the words "if by law such recording or registering is required," has occupied the attention of several of the inferior federal courts with varying results. In the Northern District of New York it was held, under registry laws practically identical with our own, that a real-estate mortgage was not *required* to be recorded within the meaning of the clause in question, and hence that such a mortgage, given in good faith more than four months before the bankruptcy proceedings, but not recorded until just before the petition was filed, could not be invalidated as a preference. *In re Hunt,* 139 Fed. 283. A contrary result was reached, under substantially different registry laws, in *English v. Ross* (M. D. Pa.) 140 Fed. 630. In a number of cases in the inferior federal courts it has been held, in reference to chattel mortgages, that where the state law requires them to be recorded in order to validate them as against creditors or purchasers in good faith, although valid between the parties, they are *required* to be recorded within the meaning of the bankrupt act. *First Nat. Bank v. Connett,* 142 Fed. 33; *Loeser v. Sav. D. Bank,* 148 Fed. 975; *In re Reynolds,* 153 Fed. 295. In these cases the clause in question was held applicable. In the first two the mortgages were given to secure existing debts. In the last case, however, the mortgage was given to secure a present loan, and so the case may rightly be said to be in some sense an authority in support of the trustee's contention here. It is to be noted, however, that the point that the transaction was not a preference of a creditor at all was neither suggested nor considered in the case, and that the law of Arkansas, which governed the

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mortgage, provided that no mortgage should be a lien on the mortgaged property until actually filed in the proper office, while in Wisconsin a chattel mortgage is a valid lien as between the parties though never filed, and a real-estate mortgage given in good faith is valid as to all the world, except subsequent purchasers in good faith, though never recorded. But we should not feel inclined to follow these authorities, even if they were exactly in point. When the supreme court of the United States decides that the preference section in the bankrupt law applies to such a transaction as the giving of the mortgage in the present case, we shall of course bow to that decision. Until that time we shall follow what seems to us the correct principle as laid down in this opinion. The result is that *Claridge* was entitled to a judgment of foreclosure against the fund in court.

Passing to the action to recover the preferential payments made within the four-months period, we find a different question. These were payments made upon an antecedent debt. True it was a secured debt, but only to the amount of the security. On June 25, 1906, when the four-months period began, the company owed *Claridge* $5,000 and his security was only of the value of $1,725. Thus, as to the sum of $3,275, *Claridge* was an unsecured creditor, and he could not, with knowledge of his debtor's insolvency, obtain a valid preferential payment on his unsecured debt within the four-months period, because this would give him a greater percentage than any other unsecured creditors, of whom there were a considerable number. After exhausting his security his debt is of the same class as all other unsecured contract debts which are not given priority by the terms of the bankrupt act. The judgment in the second action was therefore correct.

It follows that in the foreclosure action the judgment must be reversed, with costs, and the action remanded with directions to enter judgment of foreclosure against the fund

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in court, while in the trustee's action to recover the preferential payments the judgment must be affirmed, with costs.

By the Court.—It is so ordered.

The following opinion was filed November 10, 1908:

SIEBECKER, J. (*dissenting*). I cannot concur in the court's holding that, under the provisions of the bankruptcy act, as amended February 5, 1903, *Claridge* did not secure a preference under the mortgage recorded October 19, 1906. It is conceded that the mortgagee knew that the mortgagor was insolvent at the time the mortgage was given as well as when it was recorded. A mortgage given by a debtor, either to secure payment of a present loan or to secure future advancements, whether given within or prior to the four months before the filing of the petition in bankruptcy, creates no preference under the bankruptcy act, but a mortgage so given to one of a class of creditors to secure a prior debt creates a preference, in that such mortgage creditor is thereby taken from a class of creditors for preference. Unless such a mortgage was void under the local law, such a preference, before the amendment of February 5, 1903, could only be attacked if given within the four months immediately preceding the filing of the petition in bankruptcy. This state of the law permitted debtors to give security to favored creditors by keeping the instruments off the record and thereby to conceal the fact of such preference from existing and subsequent creditors. Such a practice was well calculated to lull such other creditors into a sense of security as to the debtor's financial responsibility and to induce the belief that all his creditors stood on an equality as to payment out of his estate. In fact, it afforded an opportunity to give a secret preference to some one or more of the same class of creditors and resulted in inequities among the members of such a class, if, by not recording such security, its giving could be kept secret

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for four months. The amendment of February 5, 1903, it seems to me, was intended to prevent such secret securities. By such amendment (sec. 60) the bankruptcy act declared, in effect, that if an insolvent, within four months before the filing of the petition, should transfer any of his property and thereby enable a creditor to obtain a greater per cent. of his debt than others of the same class, it should be declared a preference; and, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." As I view it, this court gives no other effect to the amendment than to hold that the validity of a transfer, made prior to the four months pending the filing of the petition but recorded within that period, may be assailed as of the date when the transfer was made. The language of the amendment, when applied to what precedes it, discloses an apparent intent by Congress to make the time of recording the time of transfer of the property covered by the instrument of transfer, instead of the time when the transfer would be effectual under the local law. Under the amendment of February 5, 1903, the validity of a voidable preference should, I think, be determined as of the day on which the mortgage was recorded, which in this case is October 16, 1906, instead of the day of its delivery to *Mr. Claridge,* December 16, 1904. These facts present a case of a transfer within the four months prior to the filing of the petition in bankruptcy, when the mortgagor was insolvent to the knowledge of the mortgagee, and, under the ruling of the court, enables *Mr. Claridge* to obtain a greater percentage of his pre-existing claim than the other creditors of the same class. Under the circumstances the mortgage was fraudulent within the provisions of the bankruptcy act, and the trustee should be entitled to judgment declaring it void, and awarding him the amounts applied within the four months before the filing

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of the petition in bankruptcy, in payment of the debt secured by it, as adjudged by the lower court. I deem the following cases, referred to in the opinion of the court, as controlling and supporting these conclusions: *First Nat. Bank v. Connett,* 142 Fed. 33; *In re Reynolds,* 153 Fed. 295; *English v. Ross,* 140 Fed. 630.

The mortgage, in view of the provisions of the law of this state for recording mortgages, is an instrument required to be recorded within the meaning of the amendment of February 5, 1903. As held in the *English Case, supra,* the amendment contemplates that instruments shall be recorded whenever recording is necessary to protect the transferee against subsequent purchasers, even though such instruments may be valid between the parties thereto without recording. The mortgage to *Claridge,* in my opinion, should be judged, on the question of preference, as if executed and delivered on the day it was recorded. When so considered, it results in a preference under the established facts, and it is fraudulent and void under the bankruptcy act.

KERWIN, J. I concur in the foregoing dissenting opinion of Mr. Justice SIEBECKER.

The following opinion was filed December 15, 1908:

WINSLOW, C. J. The appellant moves for a rehearing in the action brought by the trustee to recover the preferential payments made within the four-months period, and urges two grounds, viz.: (1) That the note of $1,000, which is said in the statement of facts to have been paid June 29th, was in fact paid June 23d, and hence was not paid within the four-months period; and (2) that there is no finding to the effect that *Claridge* had reasonable cause to believe that a preference was intended when these payments were made, and hence that there can be no recovery under subd. *b,* sec. 60,

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of the bankruptcy act. Act July 1, 1898, ch. 541, 30 U. S. Stats. at Large, 562 (U. S. Comp. Stats. 1901, p. 3445).

1. As to the first claim, the matter must be considered as settled adversely to the appellant's contention by finding of fact number 17 in the preference action, to which there was no exception. That finding says that on the 29th day of June, 1906, *Claridge* paid to himself from the funds of the association $1,003.80 as payment in full of a note of $1,000 and interest secured by the mortgage, and that on the 25th day of August, 1906, he paid to himself $1,519.75 as payment in full of the $1,500 note, and that at both times he knew the association to be insolvent. It is true that in the seventh finding a list is given of the various notes given under the mortgage, with their respective dates of payment, and that in such list the $1,000 note has opposite to it, as the date of payment, "June 23, 1906." This makes an apparent contradiction in the findings, but the seventeenth finding, being a specific finding directed to the special question of the time of payment, must be held as controlling over the mere recapitulation of the notes contained in finding 7. *Phalen v. Hershey L. Co.* 136 Wis. 571, 118 N. W. 219. An error in printing the cases in the two actions may here be noted which may account for the misapprehension of appellant's counsel on this point. In both printed cases the findings in the foreclosure action are printed as the findings of the court, and these findings did not contain finding 17 as above quoted, but an entirely different proposition. We were obliged to go to the record in the preference action to find the correct findings.

2. It is true that the statute requires that a preferred creditor must have had reasonable cause to believe that a preference was intended at the time of receiving his preference before the same can be set aside, and it is equally true that in the present case there was no finding that *Claridge* had such cause, either on the 29th of June or on the 25th of August, but only that he had such cause on the 19th of Octo-

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ber, when the mortgage was recorded. This was evidently upon the theory that his rights were to be determined solely by the situation at the time of the recording of the mortgage. The court, however, found that the association was insolvent, to the knowledge of *Claridge,* at the time the mortgage was executed, and was also insolvent at all times within the four months immediately preceding the bankruptcy proceedings, which fact was also within the knowledge of *Claridge.* It also appeared without dispute that *Claridge* was the active manager of the entire business of the association from the time of the giving of the mortgage up to the time of its bankruptcy, and in fact was the only person who had personal and accurate knowledge of its affairs; and further, that as secretary he in fact made the preferential payments to himself. Thus he was, in effect, both debtor and creditor, and whatever he knew in one capacity he also knew in the other. The complete and practically hopeless insolvency of the association was known to him when he made the payments to himself, and it was also known to him that the effect of each payment was to enable himself as creditor to obtain a greater percentage of his debt than other creditors of the same class. Thus at the time he made the payments he knew that all the facts existed which are necessary to constitute a preferential payment under subd. *a,* sec. 60, of the bankruptcy act. In order that a preference within the terms of subd. *a,* sec. 60, should be recoverable, the statute only requires that the creditor should have reasonable cause to believe that a preference was intended. 1 Remington, Bankruptcy, § 405. Could a creditor, to whom the utterly insolvent and practically hopeless condition of his debtor had been fully explained, at the time he received a payment or transfer, be heard to say with any reason that the facts known to him did not give him reasonable cause to believe that a preference was intended? We think not. A finding to the contrary could hardly be sustained, and hence the motion for a rehearing must be denied.

By the Court.—It is so ordered.

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KIPP, Appellant, vs. SMITH, Executor, and another, Respondents.

November 14—December 15, 1908.

Bills and notes: Trial: Questions for jury: Bona fide *purchasers: "Bad faith:" Holder in due course: Gross negligence: Sales of territory for nonpatented articles: Good consideration.*

1. Where there is no direct evidence showing that plaintiff, indorsee of a promissory note, knew the nature of the consideration thereof, but there was much evidence of a circumstantial character tending to show that he had considerable knowledge of the business in which the original payees of the note were engaged and of the circumstances under which such note, and others which he purchased at the same time, were given, it was not error to submit to the jury the question whether the plaintiff was a holder in due course.
2. Sec. 1676—26, Stats. (Supp. 1906), governing negotiable instruments, provides that, to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith. Hence it is error to instruct the jury that if the plaintiff, indorsee of a promissory note, had notice of facts which would put a man of ordinary intelligence and prudence upon inquiry, he would be charged with knowledge of the facts which the inquiry would have shown, and that, if he was guilty of gross negligence in not following up the inquiry which facts known to him suggested, the law would charge him with notice of all the facts which he might have ascertained by the inquiry, and he could not be a purchaser in good faith.
3. While gross negligence is evidence from which bad faith may be inferred, it does not of itself constitute bad faith as matter of law.

[4. Whether a person can be said to be a holder of a negotiable instrument in due course who, without inquiry, takes from an officer of a corporation, in payment of a private debt, a negotiable note which appears on its face to be the property of the corporation, suggested, but not decided.]

5. In order to be a holder in due course the transferee must take the instrument "in the usual course of business."

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6. While in the case of a nonpatented article there can be no such thing as the sale of territory or exclusive territorial rights in the sense in which the terms are used with regard to patented articles, such selling rights may constitute good consideration for promissory notes.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This is an action upon a promissory note for $250, which was one of four notes executed by Howard J. Smith (respondent *Irving C. Smith's* testator) and *William L. Pfeiffer* to the Advance Fire Appliance Company, a partnership, on October 31, 1903. The partnership was composed of one Scheuer and one Weinsheimer, and was engaged in manufacturing and selling an unpatented dry compound for extinguishing fires, prepared from a secret formula and known as "Blaze Killer," and which was put up in tin tubes having on the outside a design composed of a shield and trefoil with the words "Blaze Killer" thereon, which was labeled a trademark but never recorded or copyrighted. The compound had been upon the market since its discovery in 1899 by one Schaffer and had attained some general sale. The consideration of the notes (which in all amounted to $950) consisted in the agreements of a written contract executed on the same day by the parties. This contract recited that whereas the defendants had purchased from the first parties and paid for "the right and privilege for the exclusive sale of its fire extinguisher (Blaze Killer) in Brown county, Wisconsin, it was agreed;" then followed a statement of the fixed price per dozen, viz. $6, at which for a term of ten years the first parties were to sell the Blaze Killer to defendants in any quantity the defendants might wish; an agreement that, should the first parties sell any Blaze Killers to any one within the said county, they would maintain a price five times as great as that charged the defendants and pay to defendants the difference monthly; a provision that no sales

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should be made by defendants outside of the territory, but, if any were made, that defendants should pay to the first parties one half of the sums received in excess of the contract price; also a provision that the contract should become void in case three dozen were not sold by defendants in any year; and a further provision giving the defendants one half of the amount paid for exclusive agency rights in other territory by any purchaser whom they obtained.

Soon after the contract was made a domestic corporation was formed, of which Scheuer became president, and the partnership transferred to the corporation all its business and property, including the note in suit, which was specially indorsed by the partnership to the order of the corporation without recourse. On December 2, 1903, the defendants surrendered the previous contract to the corporation and received in exchange a new contract executed by the corporation and themselves, which was intended to take the place of the previous contract. It stated that the corporation had appointed the defendants its agents for the sale of Blaze Killer and such other articles as it might place on the market, and that it sold to the defendants the "exclusive privilege for the sale of its extinguishers and other goods" in Brown, Calumet, and Oconto counties. This agreement fixed the prices at which Blaze Killer should be furnished to defendants up to January 1, 1921, at $6 per dozen for cash, but, in case notes had been given for territorial rights, then the price should be $13.50 per dozen cash, of which $7.50 was to be indorsed on the notes until the notes were fully paid, after which the price was to be $6. It contained the same stipulation as the former agreement as to the prices which the corporation would maintain and the amounts which it would pay to the defendants in case it sold Blaze Killer to any other persons within the territory, with a proviso that, in case such sales were made by any agent working for the corporation under a similar contract, the defendants should

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rely only on the agreement of such agent to turn over to the corporation, for the benefit of defendants, one half of the amount of such sales exceeding $6 per dozen. It also contained a stipulation that if defendants sold any Blaze Killer outside of their territory they would report same to the corporation and turn over to it monthly one half of the amounts so received in excess of $6 per dozen for the benefit of the agents having the right to such territory, failure to do which should *ipso facto* terminate the contract. It also contained like provisions as to the termination of the contract in case three dozen were not sold in any year and as to the amount to be paid to defendants in case they secured a purchaser for additional territory, except that such amount was to be twenty-five per cent. of the proceeds instead of one half.

The note in suit was payable one year after its date, and on the 7th of May, 1904, the plaintiff received it from Scheuer in payment of a personal obligation to him from Scheuer, and it was then indorsed: "Pay to *B. A. Kipp* without recourse. Advance Fire Appliance Company by Joseph F. Scheuer, Prest., F. L. Grieb, Secy." The plaintiff claimed to be a *bona fide* holder before due, but the defendants claimed that he took the note with knowledge of the facts, and that there was in fact no consideration for it. The trial court held as matter of law that there was no consideration, and submitted to the jury the single question whether the plaintiff bought the note in the usual course of business in good faith, for value, and without notice of what it was given for. The jury answered this question in the negative, and, judgment being rendered for the defendants, the plaintiff appeals.

For the appellant there were briefs by *Sheridan & Evans*, and oral argument by *W. L. Evans*.

For the respondents there was a brief by *Cady, Strehlow & Jaseph*, and oral argument by *S. H. Cady* and *M. H. Strehlow*.

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WINSLOW, C. J. There was no direct evidence showing that the plaintiff knew the nature of the consideration given for the note in suit, but there was much evidence of a circumstantial character tending to show that he had considerable knowledge of the business in which the original payees of the note were engaged and of the circumstances under which this note, and others which he purchased at the same time, were given. There was no error, therefore, in submitting the question whether the plaintiff was a holder in due course to the jury; but the serious question on this branch of the case is as to the correctness of the charge of the court.

The court instructed the jury, in substance, that, if the plaintiff had notice of facts which would put a man of ordinary intelligence and prudence upon inquiry, he would be charged with knowledge of the facts which the inquiry would have shown; and that, if he was guilty of gross negligence in not following up the inquiry which facts known to him suggested, the law would charge him with notice of all the facts which he might have ascertained by the inquiry, and that he could not be a purchaser in good faith. This, we think, was error. The Negotiable Instrument Law—sec. 1676—26, Stats. (Supp. 1906)—provides that, "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." By the great weight of modern authority, gross negligence is evidence from which bad faith may be inferred, but it does not of itself constitute bad faith as matter of law. That is a question for the jury after consideration of all the evidence. 1 Daniel, Neg. Inst. §§ 774, 775, and cases cited in notes; 4 Am. & Eng. Ency. of Law (2d ed.) 300; 7 Cyc. 944, 945. Such is substantially the rule adopted by this court in *Kelley v. Whitney*, 45 Wis. 110, and *Boyle v. Lybrand*, 113 Wis. 79, 83, 88 N. W. 904.

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Another question has presented itself to our minds in this connection which seems worthy of very serious consideration, but as it was not raised or argued in either court and is not necessary to be now decided we express no opinion upon it. The question is this: Can a person be said to be a holder in due course who, without inquiry, takes from an officer of a corporation, in payment of a private debt, a negotiable note which appears on its face to be the property of the corporation? In order to be a holder in due course he must take it "in the usual course of business." Is such a transaction in the usual course of business in view of the principle that one who takes in payment of a private debt the promissory note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularity that may exist in its execution? *Hiawatha I. Co. v. John Strange P. Co.* 106 Wis. 111, and cases cited on p. 116 (81 N. W. 1034). We merely suggest this question now. The case must go back for a new trial in any event, and upon such new trial the question of actual notice should again be submitted to the jury by proper special question. Should the jury again find actual notice the question above suggested will be immaterial, but if they find to the contrary the question above suggested can be answered by the court after due consideration and argument, as the facts bearing upon it seem to be undisputed.

Upon the question of consideration the trial court held, as matter of law, that there was no consideration because, the Blaze Killer not being a patented article, there could be no sale of exclusive territorial rights in it, and as the defendants bought only territory or territorial rights they received no consideration. We cannot regard this ruling as correct. It is true that in the case of a nonpatented article there can be no such thing as the sale of territory or exclusive territorial rights in the sense in which those terms are used with regard to patented articles; but the sole agency for the sale of a nonpatented article in a given city or county may be a

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desirable and valuable privilege, notwithstanding neither party can prevent others from invading the territory and selling the same or similar articles which they have purchased elsewhere. The value of the privilege will depend, of course, upon the desirability and good repute of the article and the ease or difficulty with which it may be simulated or purchased elsewhere. Such selling rights in desirable non-patented articles are frequently given, and no reason is perceived why, in the absence of other grounds of invalidity, they may not constitute good consideration for promissory notes. *Clark v. Crosby,* 37 Vt. 188; *Roller v. Ott,* 14 Kan. 609; *Keith v. Herschberg O. Co.* 48 Ark. 138, 2 S. W. 777.

The case of *Apollinaris Co. v. Scherer,* 27 Fed. 18, which was largely relied upon by respondents' counsel, holds nothing to the contrary of this doctrine. In that case the owner of a mineral spring in Europe had granted to the plaintiff the exclusive right of export and sale in this country of the mineral water. Third persons, however, purchased the water in Europe from the owner of the spring and imported it to this country and sold it in competition with the plaintiff. The action was brought against these third persons to prevent them from doing this, but it was held that the owner of the spring could not grant any exclusive territorial right which would prevent those who had lawfully purchased the water in Europe from bringing it to this country and selling it in competition with the plaintiff. But it is further said in the case that there would seem to be no doubt that the agreement was a valid agreement as between the parties, and that if the owner of the spring were endeavoring to compete with the plaintiff in the sale of the water in this country, the agreement could be enforced by injunction.

Prima facie, therefore, there was a valuable consideration for the note, especially as there was testimony tending to show that Blaze Killer was an article which had acquired some general sale. It may perhaps be shown that the right

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was of no value or that the contract was induced by fraudulent representations of fact, upon which the defendant relied; but neither of these facts appeared in the evidence without controversy so that the court could take them from the jury.

By the Court.—Judgment reversed, and action remanded for a new trial.

PAULSON and another, Receivers, Appellants, vs. BOYD, imp., Respondent.

November 27—December 15, 1908.

Evidence: Written instruments: Contemporaneous verbal agreements: Admissibility: Bills and notes: Defenses: Bona fide *purchasers.*

1. Under the evidence, stated in the opinion, it is *held* that an agreement existed between the defendant and the payee of the note in suit, whereby the note was not intended and agreed to be a present binding agreement, but was delivered upon condition that if defendant paid the interest for eighteen months the payee should twice renew the note within that period, and if at the end of that period the defendant did not wish to purchase certain mining stock the prior agreement to purchase was to be terminated at defendant's election and the note canceled.
2. Under the elements of such agreement the delivered note did not become a completed contract *in præsenti*, and the oral agreements relative to its status are *held* not to be contradictions of the note itself.
3. A newly incorporated bank obtained the assets of a private bank, including the note of defendant on which the instant action was brought, pursuant to a resolution of the stockholders instructing the directors to assume the liabilities of the private bank in consideration of the transfer of such assets, defendant's note being subject to an oral agreement whereby it never became a completed contract *in præsenti*. *Held*, that defendant could assert such incompleteness as a defense to the note in the hands of the new bank.

TIMLIN, KERWIN, and MARSHALL, JJ., dissent.

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APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action upon a promissory note by the receivers of the Security Savings Bank, incorporated, against the maker of the note and the former owner of the note as indorser. *L. T. Boyd* is the maker of the note and J. S. Ellis is the payee and indorser. It appears from the evidence of *Boyd* and Ellis that the note was given to Ellis by *Boyd* as a part of a transaction concerning the sale of some mining stock. *Boyd* was to give his note to Ellis for $2,500, the purchase price of the stock. The note, dated October 17, 1902, was for six months, and was to be renewed twice for the same length of time. The testimony of *Boyd* as to the terms of the parol agreement is admitted by Ellis to be correct; and the agreement, in effect, is embodied in *Boyd's* evidence, set out in the record as follows:

"Shortly prior to the date of the first note he persuaded me as a good friend of his to go into this deal with him and take some of his mining stock. I told him then that I had no money, and that I was in debt and couldn't afford to take the chance. He said he wouldn't urge me to do this if he didn't know all about it. I stated that I didn't have any money to buy it with, and he said, 'That doesn't make any difference,' and he said, 'I will carry it with the bank. I will carry it eighteen months if you will pay the interest.' Then I said, 'Suppose at the end of eighteen months I can't pay it?' He said, 'Then I will take it off your hands; but I am sure that you will have realized enough on it to pay it and make a good profit.' I said, 'I don't see any reason why you should do that for me;' and he said, 'I know you have been up against it pretty hard, and I would like to see you make some money,' and I said, 'That is very friendly of you, and I will accept the offer,' and in that case I took the stock conditionally, and signed the note which he was to renew twice, and at the expiration of the eighteen months, if I didn't want the stock, he would take it off my hands."

There was no actual delivery of the certificates of stock by Ellis to *Boyd*. At the time of this agreement Ellis conducted a private banking business under the name "Security

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Savings Bank." Pursuant to the provisions of ch. 234, Laws of 1903, the Security Savings Bank was incorporated for the purpose of succeeding to the business and assets of the private bank of the same name previously conducted and managed by J. S. Ellis. The new bank was incorporated August 21, 1903, the incorporators and stockholders being Ellis and his relatives. J. S. Ellis, his brother, E. H. Ellis, and his sister, Mrs. Loranger, each took a quarter of the entire capital stock. Mrs. Kennedy, a sister of J. S. Ellis, took the remaining quarter, with the exception of one share taken by her son Ellis. At the stockholders' meeting which succeeded the meeting of the incorporators the stockholders were elected directors and by-laws were adopted. The record of this meeting shows the following:

"On motion it was ordered that the board of directors be and are directed to assume the liabilities of the private bank heretofore known as the Security Savings Bank of Ashland, Wisconsin, in consideration of the transfer of the assets of said bank to their corporation."

At the directors' meeting J. S. Ellis was elected president, E. H. Ellis, his brother, vice-president, and Ellis Kennedy, a nephew and former employee of the president, was elected cashier. Under the agreement between *Boyd* and Ellis three notes were given by *Boyd* to Ellis and deposited by Ellis at the bank. All were payable to the order of Ellis. Two of them were made before the incorporation of the bank, and one, the note in suit, thereafter. In each instance *Boyd* and Ellis conducted these transactions. The note in suit was received by Ellis as president and turned over to the cashier with instructions. The mining stock was always in the possession of Ellis and the transfer of the stock on the books of the corporation was not made until after the execution of the last note. The certificate of stock then made out was sent to Ellis and held by him. *Boyd* offered to transfer any interest in the shares of mining stock to which the agreement between him and Ellis referred,

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and renewed this offer at the trial. Plaintiffs refused to accept his offer of a written assignment. Both parties moved for the direction of a verdict. The court granted the motion of the defendant, and judgment was entered in accord with the verdict so ordered. This is an appeal from the judgment.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray* and *H. B. Walmsley,* and oral argument by *Mr. Walmsley.* They contended, *inter alia,* that the corporation was not charged with knowledge possessed by its officer where he is committing an independent fraudulent act on his own account, and this applies in the case of a president and director like the defendant Ellis. *Brookhouse v. Union P. Co.* 73 N. H. 368, 6 Am. & Eng. Ann. Cas. 675; *Allen v. South Boston R. Co.* 150 Mass. 200, 22 N. E. 917; *Indian Head Nat. Bank v. Clark,* 166 Mass. 27, 43 N. E. 912; *Produce Exch. T. Co. v. Bieberbach,* 176 Mass. 577, 588, 58 N. E. 162; *Camden S. D. & T. Co. v. Lord,* 67 N. J. Eq. 489, 58 Atl. 607; *Davis v. Boone Co. D. Bank* (Ky.) 80 S. W. 161; *Central Bank v. Thayer,* 184 Mo. 61, 82 S. W. 142; *Southern Comm. Sav. Bank v. Slattery's Adm'r,* 166 Mo. 620, 66 S. W. 1066; *Mead v. Pettigrew,* 11 S. Dak. 629, 78 N. W. 945; *First Nat. Bank v. Briggs's Assignees,* 70 Vt. 594, 41 Atl. 580; *Graham v. Orange Co. Nat. Bank,* 59 N. J. Law, 225, 35 Atl. 1053; *Nat. Bank v. Feeney,* 9 S. Dak. 550, 70 N. W. 874; *People's Sav. Bank v. Hine,* 131 Mich. 181, 91 N. W. 130; *Gunster v. Scranton I., H. & P. Co.* 181 Pa. St. 327, 37 Atl. 550; *Frenkel v. Hudson,* 82 Ala. 158; *American S. Co. v. Pauly,* 170 U. S. 133; *Clark v. Marshall,* 62 N. H. 498, 500; *Bank of Overton v. Thompson,* 118 Fed. 798; *First Nat. Bank v. Bevin,* 72 Conn. 666, 45 Atl. 954, 955; *First Nat. Bank v. Tompkins,* 57 Fed. 20; *Winchester v. B. & S. R. Co.* 4 Md. 231; *Johnston v. Shortridge,* 93 Mo. 227, 6 S. W. 64; *Wyeth v. Renz-Bowles Co.* (Ky.) 66 S. W. 825; *Corcoran v. Snow C. Co.*

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151 Mass. 74, 23 N. E. 727; *Hatch v. Ferguson,* 66 Fed. 668; *Levy & C. M. Co. v. Kauffman,* 114 Fed. 170; *Seixas v. Citizens' Bank,* 38 La. Ann. 424; *Graham v. Orange Co. Nat. Bank,* 59 N. J. Law, 225; *Lamson v. Beard,* 94 Fed. 30; *Knobelock v. Germania Sav. Bank,* 50 S. C. 259, 27 S. E. 962; *Richardson v. Watson,* 51 La. Ann. 1390, 26 South. 422; *Victor G. & S. M. Co. v. Nat. Bank,* 15 Utah, 391, 49 Pac. 826; *Tate v. Security T. Co.* 63 N. J. Eq. 559, 52 Atl. 313; *Seaverns v. Presbyterian Hospital,* 173 Ill. 414, 50 N. E. 1079; *Terrell v. Branch Bank,* 12 Ala. 502; *Lyne v. Bank of Ky.* 5 J. J. Marsh. 545; *Farrel Foundry v. Dart,* 26 Conn. 376; *La Farge F. Ins. Co. v. Bell,* 22 Barb. 54. Where the bank acts entirely through another or others in the transaction, the knowledge of the offender is not imputable to the bank. *Nat. Bank v. Feeney,* 9 S. Dak. 550, 70 N. W. 874, 876. The director's knowledge is not imputable to the bank where he turns the note over to it through its cashier and does not himself act as a director upon the discount. *English-Am. L. & T. Co. v. Hiers,* 112 Ga. 823, 38 S. E. 103; *Powles v. Page,* 10 Jur. 526; *Lucas v. Bank of Darien,* 2 Stew. 280; *Farmers & Citizens Bank v. Payne,* 25 Conn. 444; *Louisiana State Bank v. Senecal,* 13 La. 525; *Shaw v. Clark,* 49 Mich. 384, 13 N. W. 786; *Johnston v. Shortridge,* 93 Mo. 227, 6 S. W. 64; *Buffalo Co. Nat. Bank v. Sharpe,* 40 Neb. 123, 58 N. W. 734; *First Nat. Bank v. Christopher,* 40 N. J. Law, 435; *Fulton Bank v. N. Y. & S. C. Co.* 4 Paige, 127; *Westfield Bank v. Cornen,* 37 N. Y. 320; *Commercial Bank v. Burgwyn,* 110 N. C. 267, 14 S. E. 623; *Merchants' Nat. Bank v. Lovitt,* 114 Mo. 519, 21 S. W. 825; *Loomis v. Eagle Bank,* 10 Ohio St. 327; *Custer v. Tompkins Co. Bank,* 9 Pa. St. 27; *New York v. Tenth Nat. Bank,* 111 N. Y. 446, 18 N. E. 618.

For the respondent there were briefs by *Winkler, Flanders, Bottum & Fawsett,* and separate briefs signed also by

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James G. Flanders, and oral argument by *Mr. Flanders.* They contended, *inter alia,* that the bank was charged with notice of the facts within the knowledge of Ellis as its director and president at the time of its incorporation and the taking over of the assets of the old bank. *Bank of U. S. v. Davis,* 2 Hill (N. Y.) 451, 461, 463; *Wis. Cent. R. Co. v. Wis. R. L. Co.* 71 Wis. 94, 107; *In re Plankinton Bank,* 87 Wis. 378, 383; *Nat. Bank v. Munger,* 95 Fed. 87, 92; *Holden v. New York & E. Bank,* 72 N. Y. 286; *Union Bank v. Campbell,* 4 Humph. 394; *Nat. S. Bank v. Cushman,* 121 Mass. 490; *Waynesville Nat. Bank v. Irons,* 8 Fed. 1; *Loring v. Brodie,* 134 Mass. 453, 457.

SIEBECKER, J. At the trial the defendant *Boyd* relied upon an agreement between him and Ellis, the payee in the note given by the defendant. The transaction between the defendant and Ellis for the purchase of mining stock is admitted by Ellis to have constituted the agreement for which the notes were given. The primary question is: What was the parol agreement between these parties? The evidence of it is not voluminous or contradictory, and is, in effect, that Ellis undertook to assist *Boyd* in securing the advantages of an interest in a mine, if it should prove a profitable enterprise at the expiration of eighteen months. To accomplish this *Boyd* contracted for the purchase of some mining stock from Ellis at an agreed price of $2,500 upon the following arrangement: Since *Boyd* had no available means to make such a purchase, Ellis made him an offer for such purchase, under which *Boyd* was to give him a note for the amount, which Ellis was to carry and renew for eighteen months. If the stock had not then realized enough to pay the purchase price and *Boyd* did not then want the stock, then Ellis was to take it off his hands and cancel the note. The stock realized nothing, and *Boyd* insists that, under the parol agreement with Ellis at and before the delivery to Ellis

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of the first note, the notes never went into effect as completed contracts. He contends that he was to have the right at the expiration of eighteen months to elect whether he wanted the stock. We are of the opinion that the facts sustain this claim and show such an agreement between the parties.

An examination of the evidence, in view of the relations of the parties and the considerations which induced him to make and deliver the note, leads us to the conclusion that it was not intended and agreed by them that the note should be a present binding agreement, but that it was delivered to Ellis upon the condition that if *Boyd* paid interest on the sum for eighteen months Ellis was to renew the notes as agreed, and if at the expiration of that time *Boyd* did not want the stock the agreement to purchase was to be terminated at *Boyd's* election and the note canceled. The significance of the terms of the transaction, as shown by the evidence of the situation, is that *Boyd* had the right at the expiration of eighteen months to elect whether he would accept a transfer of the stock at the price fixed and evidenced by the note. The elements of the agreement constitute an arrangement under which the note delivered to Ellis did not become a completed contract *in præsenti,* but was to take effect as a completed contract only in the event that *Boyd,* under the agreement, elected to take a transfer of the stock within the time agreed on. Such oral agreements are not contradictory of the written instrument. This rule was declared and fully discussed in the recent case in this court of *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192, where it was held:

"It is familiar law, notwithstanding some conflict in the authorities, that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation *in præsenti* of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper, as be-

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tween the parties, will have no validity as a binding contract till the condition shall have been satisfied; and that proof of such condition does not violate the rule that a written instrument cannot be varied by a contemporaneous parol agreement; that such evidence only goes to show that the instrument never had vitality as a contract"—citing cases.

It is there also held that this principle is recognized in the Negotiable Instrument Law (sec. 1675—16, Stats.: Supp. 1906) by providing that:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, . . . delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument."

In the case of *Burke v. Dulaney,* 153 U. S. 228, 14 Sup. Ct. 816, the circumstances of the transaction are in their main features very like the instant case, and it was held by the court that a note covering the price for the sale of property by the payee to the maker, which had been delivered under an oral agreement between the parties to the effect that the note should represent the price if the maker should determine to retain the interest in a mine after having worked and inspected it, under such circumstances there was not such a delivery of the note as to make it unconditionally binding upon the obligor according to its terms, but it was delivered to become absolute if the maker elected to take the property under the terms of the oral agreement. Other cases on the subject are *State ex rel. Jones v. Chamber of Comm.* 121 Wis. 110, 98 N. W. 930; *Ware v. Allen,* 128 U. S. 590, 9 Sup. Ct. 174; *Wilson v. Powers,* 131 Mass. 539.

The question arises: Can defendant avail himself of this agreement between himself and Mr. Ellis as against the plaintiffs, the receivers of the Security Savings Bank? It is without dispute that the Security Savings Bank became in-

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corporated in August, 1903, and that it obtained this note and other securities from the private bank which Mr. Ellis had conducted prior to its incorporation. We are of opinion that the evidence is clearly to the effect that the newly incorporated bank obtained the assets, including this note, pursuant to a resolution of the stockholders directing the directors to assume the liabilities of the private bank in consideration of a transfer of the assets of the private bank to the new bank. There is no dispute but that the note obtained by the new bank by such transfer was one given in renewal of the former note given by *Boyd* to Ellis under the parol agreement for the purchase of the mining stock, and that when this second note matured the bank took the note sued on in renewal of it. There is no evidence tending to show that at the time of the renewal the original agreement was in any way changed or modified. The new notes were taken in place of the first one and represent the original obligation. *First Nat. Bank v. Case,* 63 Wis. 504, 22 N. W. 833; *Gallagher v. Ruffing,* 118 Wis. 284, 95 N. W. 117.

Can defendant assert this defense to the note in the hands of the new bank? This must be answered in the affirmative in view of the circumstances of the transfer of the assets from the private to the new bank. The condition of the transfer is that the new bank "assume the liabilities of the private bank . . . in consideration of the transfer" of its assets to the new bank. As stated, there is no question but that the transfer was in fact so made. This transfer imports that the new bank received the assets charged with the conditions to which they were subject in the hands of the private bank, and constitutes an express assumption of all defenses to which they were subject in the hands of the former owner. The note having come into the hands of Mr. Ellis as manager of the private bank, subject to the conditions of the parol agreement with *Mr. Boyd,* it follows that the new bank holds it subject to the defense that its delivery

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was conditional, "or for a special purpose only, and not for the purpose of transferring the property in the instrument." *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192.

This result renders all other questions discussed by counsel immaterial, and calls for affirmance of the judgment.

By the Court.—Judgment affirmed.

TIMLIN, J. (*dissenting*). With that part of the decision holding that the plaintiffs took the note in question subject to all defenses available by the maker against Ellis and which would go to defeat the instrument I am in accord. But I consider it a serious menace to commercial paper and in breach of the rule of law, hitherto well upheld in this state, which forbids the reception of parol evidence to vary or contradict a written contract, to admit for the purpose of defeating the note the defense here pleaded and attempted to be proved by the testimony of the defendant *Boyd.* There is no doubt about the rule of law which should be applied. It is found in the prior decisions of this court and in sec. 1675—16, Stats. (Supp. 1906):

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. . . . And, where the instrument is no longer in the possession of the party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." Sec. 1675—16, *supra; Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192, and cases cited; *Thomas v. Watkins,* 16 Wis. 549; *McLean v. Nugent,* 33 Wis. 353.

It must be borne in mind that this action is by an indorsee of a promissory note negotiable in form and against the in-

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dorser, Ellis, and the maker, *Boyd*. The answer of the defendant *Boyd* avers:

"Thereupon said Ellis offered to take a note for said sum of $2,500 and renew it twice for a period each time of six months, and that, if said defendant *Boyd* was not ready or inclined to pay for said stock, he, the said defendant Ellis, would take the stock and return and cancel the defendant *Boyd's* note, and under these circumstances, and pursuant to this agreement, said defendant *Boyd* did sign and put into the possession of said defendant Ellis a writing in the form of a promissory note for $2,500, running six months from October 17, 1902, and at the expiration of said six months the same was surrendered and a new note for another period of six months delivered to said defendant Ellis, and at the end of said second period a new one for the same amount and running six months was put in the possession of said Ellis, and that the last one so put in the possession of said Ellis is the instrument for the payment of which this action is brought."

The oral testimony of the defendant *Boyd* quoted in the majority opinion was given in answer to the following question: "*Q*. Will you state the facts and circumstances connected with the execution of that note?" To this he answered, showing that, in urging *Boyd* to take some of his mining stock, Ellis said: "I can carry it with the bank. I will carry it eighteen months if you will pay the interest." *Boyd* answered: "Suppose at the end of the eighteen months I can't pay it?" Ellis: "Then I will take it off your hands, but I am sure that you will have realized enough on it to pay it and make a good profit." *Boyd:* "I don't see any reason why you should do that for me." Ellis: "I know you have been up against it pretty hard, and I would like to see you make some money." *Boyd:* "That is very friendly of you, and I will accept the offer."

In the foregoing quoted testimony it is not quite clear when the word "it" represents the mining stock and when the note. But, taking the further testimony of the same witness, it is apparent that in the expression, "I can carry it

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with the bank. I will carry it eighteen months if you will pay the interest," "it" refers to the note. Changing to the narrative form, the witness testified: "And in that case I took the stock conditionally, and signed the note which he was to renew twice, and at the expiration of the eighteen months if I didn't want the stock he would take it off my hands." He further testified:

"The agreement was that they kept the shares of stock as collateral to the note. They were not in my physical possession. At the expiration of the first note I paid the interest and renewed the note, and at the expiration of the second note I paid the interest and gave a new note. I only know that . . . Ellis would take care of it [the note] at the bank. He told me he would take care of it at his bank. *Q.* Did you understand from J. S. Ellis, when the first note was given, that he was to put it in the bank? *A.* Yes, sir. *Q.* Did you understand, when the second note was given, that it was to be carried by the bank? *A.* I understood that the whole loan was to be carried by the bank."

Again on another subject:

"*Q.* Did you give the third note—that one here involved—before or after you received the letter that your counsel has? *A.* After I received that letter. . . . My recollection is that I held the note until I heard from him."

This letter is in evidence, and is as follows:

"FRIEND TIM: Your letter came this a. m. and under my agreement with you I must carry this paper for six months yet—if you do not want the stock at that time I will accept it in payment of the note. I think though that you will want the stock. Yours, J. S. ELLIS."

After thus setting forth the pleading and evidence it seems superfluous to say that not only was the presumption of a valid and intentional delivery created by sec. 1675—16, *supra,* not overcome, but there was affirmative proof of the delivery of the note as a note and to be in force and effect as a note. Could defendant *Boyd* avoid the force of his own undisputed testimony that he withheld delivery of the last

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renewal note, the note in suit, until he received the letter above quoted, and then upon receipt of this letter delivered the note? If he could not, then the case is ruled by *Perry v. Bigelow,* 128 Mass. 129; *Racine Co. Bank v. Keep,* 13 Wis. 209; and *Hubbard v. Marshall,* 50 Wis. 322, 6 N. W. 497.

The majority of the court seem to have overlooked the force and significance of this undisputed evidence regarding the delivery of the note in suit. But, examining the case without this letter, there was a delivery of the note. The agreement to pay interest and the payment of interest, the agreement to renew and the renewals pursuant to that agreement, are consistent only with absolute delivery. The agreement that the payee should carry the note at the bank even where the payee owned the carrying bank means that the note was considered by the parties to have been delivered. All of these are inconsistent with nondelivery or with conditional delivery. Again, in the light of the additional testimony above quoted interpreted in harmony with the pleading, the whole testimony of *Boyd* is plainly to the effect that it was orally agreed that he should give his note for $2,500 for certain shares of mining stock to be held by the seller as collateral security to that note, that the note was to run six months and to be twice renewed, *Boyd* to pay interest thereon and to have the right to avail himself of any rise in the price of the stock in the meantime, but if he did not during or at the end of the eighteen months avail himself of this right to take the shares, Ellis was to *take or keep the stock and cancel or discharge the note.* There is here no evidence of nondelivery or of conditional delivery, but rather evidence showing delivery coupled with an oral agreement that the note should be discharged or paid in a certain manner differing from that specified in the instrument itself. *Burke v. Dulaney,* 153 U. S. 228, 14 Sup. Ct. 816; *S. C.* in court below, *Dulaney v. Burke,* 2 Idaho, 719, 23 Pac. 915.

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I need not here discuss at length the facts in the case last cited. The difference between that case and the instant case is obvious, and is emphasized in the opinion by Mr. Justice HARLAN. I have no doubt the oral contract between *Boyd* and Ellis collateral to this note was founded upon a valuable consideration and enforceable by *Boyd* against Ellis. It was a sale of the shares to *Boyd* with an agreement to repurchase at the end of the eighteen months at the same price, at the option of *Boyd*. *Vohland v. Gelhaar,* 136 Wis. 75, 116 N. W. 869. But that is not the question here. This right of action of *Boyd* against Ellis did not accrue until the last renewal note became due and *Boyd* exercised his option, which was long after the note was indorsed to the bank of which the plaintiffs are receivers. Sec. 2606, Stats. (1898), and cases in note, and subd. 6, sec. 4258, Id.

KERWIN, J. I concur in the foregoing dissenting opinion of Mr. Justice TIMLIN.

MARSHALL, J. (*dissenting*). I concur in the opinion of Mr. Justice TIMLIN. It seems to me that my Brother TIMLIN has shown with a certainty equivalent to a mathematical demonstration that the note in question was intended to take effect as soon as parted with by the payor. The cotemporaneous agreement was with reference to a contingency which might enable the payor to discharge his obligation otherwise than according to its tenor. It seems quite manifest that my brethren of the majority have mistaken a condition subsequent created by parol at the time of delivery of the paper, which all agree could not be used to defeat it, for a condition subsequent contemplating necessity for the happening of a specific circumstance to give the paper effect as an obligation.

I dissent from the decision of the court upon another ground which I will mention without taking time to discuss

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it. The assumption of liability by the new bank, in my judgment, had no reference to secret defenses to commercial paper due in the future, but to liabilities of the bank as they are ordinarily understood and commonly carried upon the books; in general, consisting of indebtedness to depositors.

There are other questions discussed upon the appeal not mentioned in the court's opinion, but I take it that if it were not for the conclusion reached upon the two points I have mentioned there would have been an agreement resulting in a reversal of the judgment. In my opinion it should be reversed and judgment rendered in favor of the plaintiffs.

FROST and another, Appellants, vs. MEYER, Respondent.

November 28—December 15, 1908.

Ejectment: Statutory second trial: Terms of court: Vacating judgments: New trial: Notice: Necessity: Judgments: Amendment after expiration of term: Appeal and error: Failure to impose terms on granting new trial: Presumptions.

1. The ordinary motion to vacate a judgment and for a new trial during the term on account of error committed on the trial applies as well in actions of ejectment as in other actions, and hence the second or new trial provided by sec. 3092, Stats. (1898), is not exclusive.
2. Under sec. 2424, Stats. (1898), as amended by ch. 6, Laws of 1905 (providing that each term of the circuit court shall not end until the beginning of the next succeeding term, unless an express order for final adjournment be made and entered before the commencement of the next succeeding term in the same county), where the June term in I. county was succeeded by a term commencing the first Wednesday in November, and the September term in A. county was succeeded by a term commencing the second Monday in April, and the September term in A. county was also a special term for I. county, an order entered in A. county on October 16, vacating a judgment entered in I. county in the preceding August, is *held* to have

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been an order made at the same term at which judgment was entered.

3. The mere fact that such order was filed with the clerk after the expiration of the term did not make it an order after the term.
4. In such case a recital in the order that it was made at a general term for A. county, which was a special term for I. county "begun and held on the 16th day of October," is *held* to have had reference to the time the order was made and not to the time of the commencement of the term.
5. Where a motion for a new trial has been made at the same term and before the entry of judgment, it is within the power of the court to vacate and set aside the judgment and grant a new trial without notice.
6. A court at a subsequent term may correct a judgment or order on account of a clerical error or mistake in matter of form in the entry.
7. Where it appears from the record upon which a motion for a new trial is based that the court might have ordered a new trial on account of errors not requiring the imposition of terms, it is presumed that it was granted for such errors.
8. Where a new trial is granted without costs and no grounds are stated in the order, the presumption is, nothing appearing in the record to the contrary, that it was granted for errors not requiring the imposition of terms.
9. In so far as former decisions of the supreme court are in conflict with the foregoing rule they must be regarded as overruled.

APPEAL from orders of the circuit court for Iron county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action of ejectment brought by the plaintiffs, original owners, against the defendant, claimant under a tax title. The action was tried in the circuit court for Iron county and resulted in a verdict for the plaintiffs. After verdict and on July 1, 1905, the court signed a conditional order requiring the plaintiffs to pay the amount of taxes paid by the defendant, with interest, within ninety days. July 29, 1905, plaintiffs tendered the amount of taxes, which tender was refused, and on July 31st the money was paid into court for the defendant. On August 16, 1905, notice of taxation of costs was waived by defendant's attorney and the amount stipulated. On August 17,

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1905, one of the plaintiffs received by mail a copy of motion for a new trial, and on August 18, 1905, judgment for plaintiffs was entered by the clerk. On September 1, 1905, notice of entry of judgment was served upon the defendant's attorney. On October 16, 1905, the court made an order vacating and setting aside the judgment without terms. On October 17, 1905, a stipulation was made between plaintiffs and defendant extending the time to November 30th to file bill of exceptions. On November 10, 1905, the order vacating the judgment was filed. On December 28, 1906, the order vacating the judgment was amended by adding "and a new trial is granted herein." The motion for a new trial was based upon the following grounds:

"(1) Because the court erred in denying the defendant's request that the jury be instructed to find for the defendant. (2) Because the court erred in admitting evidence offered by the plaintiffs against the objection of the defendant as follows, to wit: (a) In admitting the record of a deed from Mitchell Iron & Land Company to Frank Billings, recorded in volume 3 of Iron County Records, p. 439. (b) In admitting the record of a deed from Frank Billings and wife to Mitchell Land Company, recorded in volume 3, Iron County Records, p. 443. (c) In admitting the plaintiffs' evidence of after-acquired title. (3) Because the court erred in refusing to allow the defendant to prove a tax deed from Iron county and state of Wisconsin to the Northern Wisconsin Land Company, and subsequent deed conveying said title acquired under said tax deed to this defendant. (4) Because the court erred in instructing the jury to find for the plaintiffs. To all of which rulings due exceptions were taken and noted in the minutes. (5) Because the verdict is contrary to law. (6) Because the verdict is contrary to evidence."

An order was also made denying plaintiffs' motion to vacate the order setting aside the judgment. Plaintiffs have appealed from the order vacating the judgment and from the order denying motion to vacate the order setting aside the judgment.

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For the appellants there was a brief by *K. K. Kennan, in pro. per.*, and *Robert L. Frost*, of counsel, and a supplemental brief by *Robert L. Frost* and *John A. McCormick*, counsel; and the cause was argued orally by *Mr. Kennan* and *Mr. McCormick*.

For the respondent there was a brief by *Paul H. Sanborn* and *H. B. Walmsley*, and oral argument by *Mr. Walmsley*.

KERWIN, J. It is insisted on the part of the appellants that, this being an action in ejectment, the court had no jurisdiction to vacate the judgment and grant a new trial, except upon condition that the costs be paid and an undertaking filed as provided in sec. 3092, Stats. (1898), and the conditions of said section have not been complied with. As we understand appellants' contention, it is claimed that the new trial provided for in sec. 3092, Stats. (1898), is exclusive, and that the court had no power to vacate the judgment and grant a new trial otherwise than in accordance with the provisions of this section. We do not so understand the statute. The ordinary motion for a new trial and to vacate the judgment during the term for the purpose of granting a new trial on account of error committed on the trial applies as well in actions of ejectment as other actions. *People ex rel. Gilman v. Wayne Circuit Judge*, 21 Mich. 372. The cases cited by counsel for appellants upon this proposition have reference to new trials granted under the provisions of sec. 3092, Stats. (1898), therefore are not applicable to the case of a new trial granted under the general provisions of law respecting new trials.

But it is contended that the order vacating the judgment was not made at the same term. It appears from the record that this order was made on the 16th day of October, 1905, at the general term of the Ashland county circuit court, which was a special term for the circuit court for Iron county. There can be no doubt but that the order of Oc-

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tober 16, 1905, was made at the same term at which the judgment was entered. Judgment was entered by the clerk on the 18th day of August, 1905. The terms of court for Iron county at the time in question commenced on the second Monday in June and the first Wednesday in November, and the terms of court for Ashland county commenced on the second Monday in April and the third Monday in September. Under the statute each term of court shall not end until the beginning of the succeeding term, unless an express order for final adjournment be made and entered before the commencement of the next succeeding term in the same county. Sec. 2424, Stats. (1898), as amended by Laws of 1905, ch. 6, sec. 6, p. 12. It does not appear from the record that the Iron county circuit court term beginning on the second Monday in June had been adjourned and the Ashland county term beginning on the second Monday in April was in session and a special term for Iron county circuit court on the 16th day of October, 1905, when the order was made, the Iron county term at which the judgment was entered not expiring until the first Wednesday in November, a later date than October 16th. So it is clear from the record that the order was made at the same term at which judgment was entered. The mere fact that the order was filed with the clerk November 10th, after the expiration of the term, did not make it an order after the term. When the order was signed on the 16th day of October it then became the order of the court. It is argued by counsel for appellants that because the order recites that it was made at the general term of the circuit court for Ashland county, which was a special term for Iron county "begun and held on the 16th day of October, 1905," and the term not commencing on the 16th day of October, this recital shows or tends to show that the order was not made at the same term. It is very obvious from the whole record that the recital simply had reference to the time when the order was made and not to the time of the commencement of the term, and

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that the order was in fact made on the 16th day of October at a general term of the Ashland county circuit court. *Emerson v. Huss,* 127 Wis. 215, 106 N. W. 518, is relied upon by the appellants as authority for their position, and counsel for respondent appears to concede that it is authority but insists that it ought not to be followed. We do not find it necessary to review the decision in *Emerson v. Huss,* because the case at bar is clearly distinguishable. The terms of Iron county and Ashland county were current when the order vacating the judgment was made, as we have heretofore shown, while in *Emerson v. Huss* an order was made in Taylor county in an action commenced in Price county, and after the expiration of the term in Taylor county the order made in the latter county was reviewed in Ashland county. So it will be seen that the general term of Taylor county, which was a special term for Price county, had expired when the order was reviewed in Ashland county. Without going into a discussion of the merits of the decision in *Emerson v. Huss,* we think it clear that in the case before us the order of October 16th was made at the same term that the judgment was entered.

It is further contended that the order vacating the judgment and granting a new trial could not be made except upon notice. It appears from the record that the motion for a new trial was made before judgment was entered and no notice of motion for a new trial was necessary. *Hansen v. Fish,* 27 Wis. 535. The motion for a new trial having been made at the same term and before entry of judgment, it was clearly within the power of the court to vacate and set aside the judgment and grant a new trial without notice. *Brown v. Brown,* 53 Wis. 29, 9 N. W. 790; *Servatius v. Pickel,* 30 Wis. 507; *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265; *Smith v. Milwaukee E. R. & L. Co.* 119 Wis. 336, 96 N. W. 823; *Hansen v. Fish, supra.* We are cited by counsel for appellants to *Wheeler v. Russell,* 93 Wis. 135,

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67 N. W. 43, and *Bailey v. Costello,* 94 Wis. 87, 68 N. W. 663. But it will be seen that *Wheeler v. Russell, supra,* turns upon the fact that there was no motion to set aside the judgment, but simply for a new trial, while in the case before us the records show that there was not only a motion for a new trial which was made before entry of judgment, but the order also recited that a motion to set aside the judgment was made. So in effect the motion for a new trial in the case before us was supplemented by a motion to set aside the judgment. *Bailey v. Costello, supra,* is a case in which the motion for new trial was made after judgment.

It is further insisted that the amendment to the order made on the 16th day of October, 1905, which amendment was made December 28, 1906, and after the expiration of the term, was error because the court had no power to change the order after the term. It is well settled that the court at a subsequent term may correct a judgment or order on account of clerical error or mistake in matter of form in the entry of an order or judgment. *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265; *Packard v. Kinzie Ave. H. Co.* 105 Wis. 323, 325, 81 N. W. 488, and cases there cited. It is obvious from the record in this case that the omission of the words from the original order, embraced in the amendment, was a mere mistake, inadvertence, or clerical error. This appears from the amendment itself, which states that they were omitted from the order by inadvertence, as well as from the whole record.

It is argued that the court erred in not imposing costs as a condition of a new trial, on the ground that, no reason for granting a new trial being stated in the order and the reason not appearing, the court should have imposed costs of the former trial as a condition, and the following cases are cited in support of this contention: *Schraer v. Stefan,* 80 Wis. 653, 50 N. W. 778; *Garny v. Katz,* 86 Wis. 321, 56 N. W. 912; *Cameron v. Mount,* 86 Wis. 477, 56 N. W. 1094.

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It is true that the above cases cited appear to support the contention of the appellants. But it will be found that later cases in this court hold a different doctrine, notably *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664; *Wolfgram v. Schoepke,* 123 Wis. 19, 23, 100 N. W. 1054; *Giese v. Milwaukee E. R. & L. Co.* 116 Wis. 66, 69, 92 N. W. 356. In *Second Nat. Bank v. Smith, supra,* at p. 24, the court in referring to this subject said:

"When such a motion is granted without the assignment of reasons, as here, the presumption is that it was granted for error of the jury, or because the court was dissatisfied with the verdict, as being inconsistent or against the weight of the evidence, if terms be imposed; but, if terms be not imposed, then the presumption is that it was granted because of errors of the court, or because the court regarded the verdict perverse. *Giese v. Milwaukee E. R. & L. Co.* 116 Wis. 66, 92 N. W. 357."

This doctrine seems to be the reasonable and logical one and is supported by the authorities holding that the presumption is in favor of lawful action of the court, and where it appears from the record upon which the motion for a new trial is based that the court might have ordered a new trial on account of errors not requiring the imposition of terms, as for example for errors of the court or because the court regarded the verdict perverse, it must be presumed that it was granted for errors not requiring the imposition of terms. So we hold that, the new trial being granted without costs and no grounds being stated in the order, the presumption is, nothing appearing in the record to the contrary, that it was granted for errors not requiring the imposition of terms. In so far as former decisions in this court are in conflict with the foregoing rule they must be regarded as overruled. It follows from what has been said that the orders appealed from must be affirmed.

By the Court.—So ordered.

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EMERSON and others, Respondents, vs. MCDONELL and another, Appellants.

November 28—December 15, 1908.

Appeal and error: Review: Presumption as to grounds of decision below: Attorney and client: Authority: Defending action in client's name: Judgment: Vacating: Surprise: Presumptions.

1. On appeal by defendants from an order denying their motion to set aside a judgment on the ground that their attorney, who had purchased the lands involved from them *pendente lite*, had defended the action in their names without their authority or consent, there was, notwithstanding their affidavit to the contrary, evidence from which the court might have found that the action was defended in defendants' name with their consent. *Held*, that the order refusing to vacate the judgment must be presumed to have gone upon the fact of such evidence.
2. When the record shows that an attorney who had appeared for defendants in the action, but who had purchased from them the lands involved therein *pendente lite*, was defending the action and appealed from the judgment therein in their names, the defendants are bound by the judgment rendered in the action.
3. In such case it is presumed that defendants knew that a judgment would follow the trial of the action in which they participated and were sworn as witnesses, and, having by consent conferred upon their attorney of record authority to give or receive notice of entry of such judgment, notice of entry thereof to such attorney is notice to defendants.
4. In such case, notice of entry of judgment having been served on defendants' attorney, the situation did not bring defendants within the calls of sec. 2832, Stats. (1898), permitting relief from judgments obtained through surprise, inadvertence, or excusable neglect.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The appeal is from a judgment denying a motion of defendants to vacate a judgment in the above entitled action and allow defendants to file a proposed answer.

For the appellants there was a brief by *L. J. Rusk & L. K. Luse,* and oral argument by *Mr. Luse.*

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Among other references upon the part of the appellants were the following: Sec. 2832, Stats. (1898); *Bloor v. Smith,* 112 Wis. 340, 87 N. W. 870; *Schobacher v. Germantown F. M. Ins. Co.* 59 Wis. 86, 17 N. W. 969; *Robbins v. Kountz,* 44 Wis. 558; *Emerson v. McDonnell,* 129 Wis. 67, 107 N. W. 1037; sec. 2801, Stats. (1898); 20 Ency. Pl. & Pr. 1035; *Belden v. Hurlbut,* 94 Wis. 562, 69 N. W. 357; *Behl v. Schuette,* 95 Wis. 441, 70 N. W. 559; *Platt v. Schmidt,* 115 Wis. 394, 91 N. W. 992; *Ean v. C., M. & St. P. R. Co.* 101 Wis. 166, 76 N. W. 329; *Palmer v. Yager,* 20 Wis. 97; *Schriber v. LeClair,* 66 Wis. 579, 29 N. W. 570, 889; *Wood v. Lake,* 13 Wis. 84; *Urwan v. N. W. Nat. L. Ins. Co.* 125 Wis. 349, 103 N. W. 1102; *Kremer v. Sponholz,* 129 Wis. 549, 109 N. W. 527; secs. 1063, 1096, 1141, 1175, Stats. (1898); *Pier v. Oneida Co.* 93 Wis. 463, 67 N. W. 702; *Chippewa River L. Co. v. J. L. Gates L. Co.* 118 Wis. 345, 94 N. W. 37, 95 N. W. 954.

For the respondents there was a brief by *Smart & Curtis,* and oral argument by *E. M. Smart.*

Among other references upon the part of the respondents were the following: *Ledebuhr v. Wis. T. Co.* 115 Wis. 214, 91 N. W. 1012; *Kuenzli v. Burnham,* 124 Wis. 480, 102 N. W. 940; *Halsey v. Waukesha Springs Sanitarium,* 128 Wis. 438, 107 N. W. 1; *Warner v. Trow,* 36 Wis. 195; *Lawrence v. Milwaukee,* 45 Wis. 306; *Strong v. Hooe,* 41 Wis. 659; *Finney v. Boyd,* 26 Wis. 366; 24 Am. & Eng. Ency. of Law (2d ed.) 737; *Grant v. Conn. Mut. L. Ins. Co.* 29 Wis. 125; *Duthie v. Washburn,* 88 Wis. 597, 60 N. W. 1053; sec. 2585, Stats. (1898); *U. S. v. Curry,* 6 How. 106; 3 Am. & Eng. Ency. of Law (2d ed.) 409; *Butler v. Mitchell,* 17 Wis. 52; *Seymour v. Chippewa Co.* 40 Wis. 62; *Boutin v. Catlin,* 101 Wis. 545, 77 N. W. 910.

TIMLIN, J. On July 28, 1899, the plaintiffs, claiming the land in question under a tax deed of June 6, 1899, began

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a suit against the defendants to quiet title under said tax deed. The defendants, by A. W. McLeod, their attorney, appeared and answered. The cause came to trial in March, 1903, and resulted in judgment for the defendants. In October, 1903, plaintiffs moved to vacate this judgment, and it was made to appear, among other things, that McLeod, while acting as attorney for defendants, and in September, 1899, while said action was pending, purchased from the defendants the land in controversy, which was vacant and unoccupied. The defendants conveyed to McLeod by quitclaim deed, which was recorded in the office of the register of deeds of Ashland county on November 11, 1899. The circuit court on this motion by plaintiffs vacated the judgment and ordered that the cause be continued in the name of *A. B. McDonell* and *Thomas Irvine* as defendants, presumably under the impression that the case was one covered by sec. 2801, Stats. (1898), and in attempted conformity to this statute. McLeod continued as he had begun upon the record as attorney for the defendants, and the cause came on for trial again in January, 1904, when the circuit court after trial made findings of fact asserting the purchase *pendente lite* by McLeod as aforesaid, and that after this purchase McLeod defended the action at his own expense and risk and for his own benefit, but in form as attorney for the defendants *McDonell* and *Irvine,* without express authority from the latter to continue the action in their names or to act in any manner for them, and the latter, after the conveyance to McLeod, took no part in the defense of the action either in person or by attorney. McLeod, on October 30, 1899, deposited with the attorneys for plaintiffs $806, that being the amount of taxes in arrears and interest and costs of taking and recording the tax deed, and on March 19, 1903, he executed a quitclaim deed of the lands in controversy to the Washburn Land Company, a corporation, which deed was recorded in the office of the register of deeds of Ashland county on April

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14, 1903, and the latter company had notice of all matters in any way affecting the title through McLeod, and notice of *lis pendens* was properly filed on September 22, 1899.

On these and some additional facts there was a conclusion of law that the purchase by McLeod above mentioned was champertous and absolutely void, and that the defendants *McDonell* and *Irvine* were in default except for their appearance, and that the defense be stricken out and judgment entered in favor of the plaintiffs on the merits to the effect that the defendants and all persons claiming by, through, or under them subsequent to the filing of notice of *lis pendens* be forever barred and foreclosed of and from any right, title, claim, or interest in or to the lands in controversy. Judgment was accordingly entered on May 9, 1905. From this judgment the defendants appealed, or McLeod appealed in the name of the defendants, to the supreme court, and the judgment was affirmed in *Emerson v. McDonnell,* 129 Wis. 67, 107 N. W. 1037, on June 21, 1906. On affidavits by the defendants tending to show that they had been overreached by McLeod in his said purchase, that McLeod used the names of defendants in the answer and in the appeal to the supreme court without authority or consent, and that after the decision of the supreme court they learned of these facts and returned to McLeod the purchase money received by them from him and demanded and obtained from him a rescission of said purchase and reconveyance of said land, the latter bearing date September 1, 1906, and upon the affidavits of other persons and a proposed verified answer stating a good defense against the tax deed, the defendants moved the circuit court for Ashland county in October, 1906, to vacate and set aside the said judgment in favor of the plaintiffs. It was shown without contradiction that during the second trial in January, 1904, the defendant *McDonell,* who had charge of this land for himself and his codefendant, attended and was sworn as a witness and was accompanied by his attorney, and neither said defendant nor his attorney made any objec-

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tion to the action of McLeod in conducting the defense of said action in the name of the defendants. The circuit court denied this motion to vacate the judgment, and from that order this appeal is taken. While the appeal to this court was pending, J. W. Emerson died intestate, leaving five infant heirs, and *Ida Emerson* was appointed his administratrix. Upon written suggestion to this court an order was made by this court substituting said administratrix and heirs as parties respondent, and *Ida Emerson* was appointed guardian *ad litem* of the infant heirs in this cause and in this court only. There was, notwithstanding the affidavit of the defendants to the contrary, evidence from which the circuit court might have found that the action was defended and appealed in the name of the defendants with their consent, and therefore the order refusing to vacate the judgment may have gone upon this fact, and we must presume it did. Even the oath taken by *McDonell* as a witness informed him who were the parties to the action at that time. In such case the defendants would be bound by the judgment rendered in the action so defended and appealed. *Logan v. Trayser,* 77 Wis. 579, 46 N. W. 877; *Carpenter v. Carpenter,* 126 Mich. 217, 85 N. W. 576. The motion by the defendants to vacate the judgment is itself a concession that the judgment against them is conclusive upon them unless vacated. This brings us to the merits of defendants' motion to vacate the judgment.

The judgment was entered May 19, 1905, notice of entry thereof served upon McLeod, the attorney of record of defendants, on May 29, 1905, and after this the judgment was affirmed by this court on appeal, and on October 8, 1906, the defendants procured and served an order to show cause why the judgment should not be vacated and they be permitted to answer. They knew there had been a trial of the action in 1904 at which the defendant *McDonell* was present with his attorney and was sworn as a witness, and they knew the defense was being conducted by McLeod, his attorney of

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record, in their names as defendants. We must therefore presume that they knew that a judgment would follow the trial, and that having by consent conferred upon McLeod authority to give or receive notice of entry of such judgment, such notice to McLeod, their attorney of record, was notice to defendants. Defendants therefore do not bring themselves within the statute (sec. 2832, Stats. 1898) which permits the court in discretion and upon such terms as may be just to relieve a party from a judgment against him, obtained through his surprise, inadvertence, or excusable neglect. This, of course, is based on the presumption in support of the order below that the circuit court found, as it might well have done upon the evidence, that the defendants, knowing that McLeod was conducting the defense in their names as defendants and attorney of record for them, acquiesced in this manner of carrying on the litigation. Assuming, therefore, but not deciding, that defendants had a right of rescission which survived all this delay and acquiescence, and survived these rights of the plaintiffs intervening, and that defendants do not derive their present title from or through McLeod, still they cannot insist that the judgment in question be vacated and the order of the circuit court denying their motion to vacate the judgment was right and should be affirmed. *Pier v. Storm,* 37 Wis. 247; *Waterhouse v. Freeman,* 13 Wis. 339; *Knox v. Clifford,* 41 Wis. 458. The decision of this court reported in 129 Wis. 67, 107 N. W. 1037, deals with the question of champerty only, and not with the legal effect of acquiescence in the use of defendants' names as parties litigant by the attorney of record to maintain them within the estoppel of the judgment and to subject them to notice of the various steps in the action through the regular notices provided by law and served upon their apparent and permitted attorney of record. This makes unnecessary the consideration of other questions argued.

By the Court.—The order of the circuit court is affirmed.

BARNES, J., took no part.

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BEEBE, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

November 28—December 15, 1908.

New trial: Grounds: Statutes: Appeal: Review: Necessity of exceptions: Review of motion for directed verdict.

1. Where a statutory motion for a new trial is made it should state the grounds upon which the motion was based, at least as specifically as they are mentioned in the statute.
2. No error can be predicated upon the refusal of a trial court to grant a new trial unless exception is taken to the ruling.
3. Sec. 3070, Stats. (1898), providing for review of intermediate orders without exceptions being taken or a bill of exceptions settled, applies only to orders which are a part of the record proper without being incorporated into the bill of exceptions, and does not apply to rulings or orders of trial courts granting or refusing motions to direct a verdict.
4. It is not necessary to make a motion for a new trial in order to review a ruling of the trial judge granting a motion for a directed verdict.
5. In the absence of a proper motion for a new trial and an appropriate exception to its denial, an order directing a verdict will not be reviewed unless it is excepted to.

APPEAL from a judgment of the circuit court for Rusk county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action is brought to recover damages for the killing of live stock on two separate occasions. At the close of the testimony the court directed a verdict for the plaintiff for the amount demanded in his complaint as amended at the trial. Defendant assigns as error the refusal of the court to grant its motion for a directed verdict and the granting of the plaintiff's motion for such verdict. Defendant urges that its motion to direct a verdict should have been granted because the notices of loss failed to state where the animals were killed, and one of them failed to state that satisfaction was claimed for the loss sustained, and, further, that the jury, upon the facts that might be legitimately considered by it, would be warranted in finding a lesser amount than that which it was directed by the court to find.

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For the appellant there was a brief by *Leroy E. McGill* and *Alfred H. Bright,* and oral argument by *John B. Sanborn.*

For the respondent there was a brief by *D. W. Maloney,* attorney, and *W. H. Stafford,* of counsel, and oral argument by *Mr. Maloney.*

BARNES, J. The defendant did not except to the order or ruling of the court directing a verdict. It moved for a new trial upon the minutes of the court, but failed to state any ground upon which it based its motion, and finally failed to take any exception to the order of the court denying the motion for a new trial. This being the state of the record, counsel for plaintiff urges that there is nothing before the court for review. If this court has authority to review the judgment in this case it must be on one of the following grounds: (1) The motion for a new trial is sufficient in form, and exception to the order refusing to grant the same is unnecessary; or (2) the order or ruling of the court in directing a verdict may be reviewed without exception and without a motion being made for a new trial.

1. The decided weight of authority in this court is to the effect that, where a statutory motion for a new trial is made, it should state the grounds upon which the motion was based, at least as specifically as they are mentioned in the statute: *Nisbet v. Gill,* 38 Wis. 657; *Slotcman v. Thomas & W. Mfg. Co.* 69 Wis. 499, 34 N. W. 225; *Collins v. Janesville,* 99 Wis. 464, 466, 75 N. W. 88; *Williams v. Williams,* 102 Wis. 246, 248, 78 N. W. 419; *Howard v. Beldenville L. Co.* 134 Wis. 644, 114 N. W. 1114, 1117. No error can be predicated upon the refusal of the trial court to grant a new trial unless exception is taken to the ruling. *Cotton v. Watkins,* 6 Wis. 629, 634; *Webster v. Modlin,* 12 Wis. 368. We are unable to discover that the rule of practice enunciated in the two cases last referred to has ever been abrogated by statute or

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by subsequent judicial decision. Outside of this state such rule is generally in force. A collection of cases supporting it may be found in 2 Cyc. 1053, and 14 Ency. Pl. & Pr. 972. The application of either of the preceding rules to the case at bar deprives the defendant of any benefit from its motion for a new trial. Sec. 3070, Stats. (1898), provides that on an appeal from a judgment this court may review any intermediate order which involves the merits and necessarily affects the judgment, appearing upon the record transmitted, whether the same be excepted to or not, and that it shall not be necessary to take any exception or settle any bill of exceptions to enable the supreme court to review any alleged error which would without a bill of exceptions appear upon the face of the record. This statute applies only to orders which are a part of the record proper without being incorporated in the bill of exceptions, and does not apply to rulings or orders of trial courts granting or refusing motions to direct a verdict. *Kirch v. Davies,* 55 Wis. 287, 298, 11 N. W. 689; *Holum v. C., M. & St. P. R. Co.* 80 Wis. 299, 303, 50 N. W. 99. Hence the appeal does not fall within the scope of this statute.

2. It is not necessary to make a motion for a new trial in order to review a ruling of the trial judge granting a motion for a directed verdict. *Plankinton v. Gorman,* 93 Wis. 560, 562, 67 N. W. 1128; *Second Nat. Bank v. Larson,* 80 Wis. 469, 472, 50 N. W. 499; *Zahn v. M. & S. R. Co.* 114 Wis. 38, 89 N. W. 889; *McGinn v. French,* 107 Wis. 54, 82 N. W. 724; *Lawless v. State,* 114 Wis. 189, 191, 89 N. W. 891. In the absence of a proper motion for a new trial, and appropriate exception to the denial of the same, an order directing a verdict will not be reviewed unless it is excepted to. This rule is affirmatively laid down in *Kirch v. Davies,* 55 Wis. 287, 298, 11 N. W. 689, and in *Holum v. C., M. & St. P. R. Co.* 80 Wis. 299, 303, 50 N. W. 99. In stating the conditions under which the court will review such an order in

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the absence of a motion for a new trial, it is said, in *Second Nat. Bank v. Larson, supra,* in *Zahn v. M. & S. R. Co., supra,* in *McGinn v. French, supra,* and in *Plankinton v. Gorman, supra,* that if the ruling of the court in directing a verdict is properly excepted to, and the exception is preserved in the bill of exceptions, it may be reviewed without a motion for a new trial. The case of *Kirch v. Davies, supra,* is cited and is apparently approved in *Rosenthal v. Vernon,* 79 Wis. 245, 250, 48 N. W. 485. The latter case holds that, where it appears upon the face of the verdict that it is directed, the ruling of the trial court in making the direction may be reviewed without exception, upon an appeal from the judgment, under the provisions of sec. 3070, above referred to. This case does not conflict with what is decided in the case under consideration, because the verdict does not show that it was a directed one. The court, however, in *Rosenthal v. Vernon,* seems to have overlooked the fact that the record, excluding the bill of exceptions, did not show that error was committed, and that it was only by recourse to the bill that the error could be discovered.

We conclude that the questions raised in this case cannot be considered, because they can only be reviewed on exceptions, and no exceptions were taken.

By the Court.—Judgment affirmed.

THIEL, Respondent, vs. JOHN WEEK LUMBER COMPANY, Appellant.

November 28—December 15, 1908.

Logs and logging: Contract to cut and bank: Breach: Assignment of contract: Splitting of demands: Debtor's nonconsent: Liability to assignor.

1. In an action to recover a balance claimed to be due for cutting, skidding, and banking logs and to enforce a lien therefor, it is *held* under the evidence that, defendant having breached the contract by refusing to permit a test scale as provided in the

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contract, it was competent for the plaintiff to show by testimony the actual number of feet of logs cut and banked, although it varied from that made by the scaler named under the contract.

2. A debt cannot be split up by a creditor against the debtor's consent, even by formal assignments, since the debtor has the right to pay his debt *in solido* and to refuse to be subjected to claims or suits by various claimants.

3. Where a debtor has refused to consent that his debt be split up by partial assignments, the creditor can maintain his action to recover the entire debt, notwithstanding there be outstanding unaccepted orders drawn by the creditor in favor of third persons.

APPEAL from a judgment of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action to recover a balance claimed to be due for cutting, skidding, and banking saw logs and to enforce a log lien therefor. The action was tried before a jury. It appeared that the parties made a written contract December 5, 1904, by which plaintiff was to cut, mark, haul, and bank on Rib river all the timber on a certain quarter-section of land during the winter of 1904 and 1905 for $5 per thousand, to be paid in instalments as the work progressed, the final payment to be made May 1, 1905. One clause of the contract provided that the logs should be scaled by a scaler to be mutually agreed on, and that either party, if dissatisfied with such scale, might demand a test scale to be made by some competent, disinterested scaler to be agreed on by the parties. It further appeared that the plaintiff did not cut the entire amount of timber, but he claimed, and gave evidence tending to prove, that he was released from entire performance by subsequent parol agreement. One Nelson was sent by defendant to do the scaling, and according to his scale the amount cut and banked was 420,830 feet. Soon after Nelson commenced scaling the plaintiff became dissatisfied with his scaling and employed another man to make an independent scale. Plaintiff claimed, also, that he communicated his

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dissatisfaction to the defendant, and that defendant's agent told him that if there was anything wrong with the scale it would be fixed up in the spring, but this was denied by the defendant's testimony. According to the plaintiff's independent scale there were 500,000 feet of logs cut and banked. It appears without dispute that on April 1, 1905, the plaintiff made a written demand that a test scale be made, and that the defendant refused to consent that such a scale be made, on the ground that it was too late and that the logs had gone down the river. There was no evidence, however, tending to show that the logs had in fact gone down the river, and the plaintiff testified that the logs were then so that they could be scaled. The defendant counterclaimed for damages for failure to cut and bank all the timber and for failure to properly bank the logs cut. The defendant also claimed that the plaintiff had sold and assigned his claim to third parties and was not the real party in interest.

The jury returned a special verdict to the effect (1) that the original written contract was made by the parties; (2) that said contract was afterwards modified as alleged by the plaintiff; (3) that during the progress of the work the defendant's agent induced the plaintiff to waive his right to demand a test scale; (4) that defendant waived the provision calling for the cutting and banking of the logs, which plaintiff failed to cut and bank; (5) that plaintiff complied substantially with the terms of the modified contract; (6) that plaintiff in fact banked 481,760 feet of logs; (7) that plaintiff's damages amounted to $563.41; (8) that plaintiff did not bank the logs in convenient rollways in a workmanlike manner in full accordance with the contract; and (9) that by reason of such failure defendant suffered damages in the sum of $110. Upon this verdict judgment was rendered for the plaintiff for the amount of his damages (less the defendant's damages on its counterclaim), with interest and costs, and the defendant appeals.

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For the appellant there was a brief by *Schweppe & Urquhart,* and oral argument by *E. H. Schweppe.*

Herman Leicht, for the respondent.

WINSLOW, C. J. We do not find it necessary to consider the errors assigned in detail. The fundamental questions in the case were whether, under the facts in evidence, the plaintiff was bound by Nelson's scale, and whether he had lost his right to have a test scale made at the time he made his demand.

The testimony as to the accuracy of Nelson's scale is not very satisfactory. Under his own testimony it appears that he actually scaled only a portion of the logs and estimated the balance, and it may well be doubted whether he in fact made a scale such as the contract required. But be this as it may, it is certain that on the 1st of April the plaintiff exercised his contract right of demanding a test scale, and all the evidence on the subject shows that at this time the logs were still in such a situation that a test scale could be made. The defendant refused this demand and thus breached the contract, and it was then competent for the plaintiff to show by other testimony the actual number of feet of logs cut and banked. This he did, and we cannot say that upon the evidence before them the jury were not justified in finding, as they did, that the whole amount was 481,760 feet. Thus all questions concerning the alleged waiver of the right to demand a test scale become immaterial.

The court did not submit to the jury any question concerning the alleged assignment of the claim to third persons, and this omission is assigned as error. The evidence shows that during the progress of the work the plaintiff drew orders on the defendant in favor of third persons amounting to more than $800, which the defendant refused to pay. The form of the orders is not given, and hence we assume that they were merely general orders to pay money and did not name

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the fund from which they were to be paid. The debt could not be split up by the creditor against the debtor's consent, even by formal assignments, because the debtor had the right to pay its debt *in solido* and to refuse to be subjected to claims or suits by various claimants. In the present case the debtor did so refuse, and could at any time have discharged its debt to the plaintiff by paying him the whole sum due, without regard to the rejected orders or liability to their holders. *Skobis v. Ferge,* 102 Wis. 122, 132, 78 N. W. 426. Hence it seems clear that, the defendant having refused to consent to partial assignments of the debt, the creditor could unquestionably maintain his action to recover the entire debt. Otherwise a situation would be presented where nobody could recover it.

No other questions are presented of sufficient importance to require treatment.

By the Court.—Judgment affirmed

DERAGON, Respondent, vs. SERO, Appellant.

November 28—December 15, 1908.

Indians: Actions: Jurisdiction of state courts: Indian reservation regulations: Duty of Indian policeman: Assault and battery: Defenses: Justification: Trial: Instructions to jury: Appeal and error: Review: Prejudicial error.

1. A state court has jurisdiction of the subject matter of an action for assault and battery notwithstanding the fact that the parties are Indians and the occurrence took place on an Indian reservation.
2. The laws of Wisconsin for the peace and good order of people within its boundaries extend to Indian reservations and apply to infractions of such laws whether by persons of Indian blood or others.
3. The reasonable limits of a direction to an Indian policeman by an Indian agent and Indian farmer, to keep people back from car entrances when persons are getting on and off cars, are that

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mere curiosity seekers, loafers, and persons having no business to go to a car entrance at a depot platform are to keep at a reasonable distance therefrom, so as not to interfere with the proper and safe transaction of business between the railroad company and its patrons in respect to railway travel; and it does not, reasonably, contemplate interference with a person going, in an orderly way, to a car entrance to meet and assist his wife and family in alighting from the car and taking care of them and their belongings.

4. Such direction of the Indian agent and Indian farmer is no justification for an assault and battery by the policeman upon an Indian residing on a reservation, who, after having been ordered back from the front of a depot platform, persisted in his attempt to meet his wife and child then arriving upon a railway train.

5. In an action by an Indian against an Indian policeman for an assault and battery committed while plaintiff was assisting his wife and child to alight from a train, in the pretended execution of a direction of an Indian agent and Indian farmer to keep people away from car entrances while passengers were getting on and off of trains at a depot platform, the evidence, stated in the opinion, is *held* to require the submission to the jury of the question of punitory as well as actual damages.

6. An assault and battery by an Indian policeman was attempted to be justified on the ground that plaintiff was violating a direction given by an Indian agent and Indian farmer. That direction, if so drastic as to justify the acts of the policeman, was unreasonable as matter of law. *Held*, that defendant was not prejudiced by submitting to the jury the question of the reasonableness of the direction.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Civil action for assault and battery.

Both plaintiff and defendant were partly of Indian blood. The occurrence was at Odanah railway station on the Indian reservation in Northern Wisconsin. The defendant justified upon the ground that he was an Indian policeman lawfully acting in the performance of his duties.

There was evidence showing, or tending to show, the following situation: Defendant was a subordinate United States officer on the Indian reservation having authority to enforce observance of the regulations of the Interior Department for

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the preservation of peace and good order and the observance of law thereon. Plaintiff knew, or ought to have known, of that fact. The latter went upon the depot platform to meet his wife and child, whom he expected, presently, to arrive by train. Defendant ordered him back from the front of the platform and persisted in enforcing his command in that regard after being informed of plaintiff's purpose. The latter persisted in carrying out such purpose after the train arrived and his wife was about to alight therefrom notwithstanding defendant indicated a determination to prevent it by force. The result was that defendant pushed plaintiff back, roughly, and knocked him down with a policeman's club and then incarcerated him in a badly kept jail for two nights and a day and then set him at liberty.

There was evidence on defendant's side tending to show he acted in good faith to enforce, as he supposed, lawful rules made by the Indian agent, his superior officer; that he assaulted plaintiff to prevent being assaulted by him; that he took him into custody because he was, and persisted in being, disorderly; that he kept him the two nights and one day because of the time, the intervening day being Sunday, and that he set him at liberty, without further pursuing the matter, as a favor. There was evidence on the other side tending to show the assault was needless and perpetrated, revengefully, to prevent plaintiff from going to meet his wife and child. There was evidence that the Indian agent had given orders to keep persons away from trains on their arrival who were not desirous of boarding the cars, but there was no rule of the Interior Department on the question, nor any rule of such department which plaintiff violated up to the time the assault occurred. The jury rendered a verdict in plaintiff's favor. The amount allowed thereby was reduced to comply with terms of denying a motion for a new trial, and judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of

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William G. Wheeler and *Henry H. Morgan,* and for the respondent on that of *V. T. Pierrelee.*

MARSHALL, J. Counsel for appellant cover a broad range in their printed argument, bringing to our attention many federal statutes and decisions and some authorized rules promulgated by the Interior Department. Such brief recognition of counsel's industry in that regard will, in the main, suffice, since it is conceded, and properly too, that, notwithstanding the occurrence took place on the Indian reservation, the trial court had jurisdiction of the subject matter of the action and the parties, if appellant's act was not performed in the proper execution of a federal statute or rule authorized by law.

The laws of this state for the peace and good order of people within its boundaries extend over Indian reservations and apply to infractions of such laws whether by persons of Indian blood or others. *State v. Doxtater,* 47 Wis. 278, 2 N. W. 439; *State v. Harris,* 47 Wis. 298, 2 N. W. 543. That does not conflict with the police duties of federal officers on reservations, rendering them liable to be prosecuted in state courts for acts lawfully done in the discharge of their duties.

There was an attempt to justify appellant's conduct on the theory that it occurred in the lawful execution of a rule of the federal government promulgated by the Interior Department, but no such rule, touching the case in hand, was produced, or is referred to in counsel's brief. Moreover, there was evidence that no such rule existed for keeping persons of Indian blood, or others, off from depot platforms on the reservations and depriving them of the ordinary privilege of going to and from car entrances on business, and that appellant did not pretend to act in execution of any such rule but of a mere verbal direction of the Indian agent and Indian farmer to keep people back from car entrances when persons were getting on and off cars. The reasonable limits of

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that direction, we apprehend, are that mere curiosity seekers, loafers, and persons having no business to go to a car entrance at a depot platform are to be kept at a reasonable distance therefrom, so as not to interfere with the proper and safe transaction of business between railroad companies and their patrons in respect to railway travel. Manifestly, it could not, reasonably, have anything to do with interference with a person going, in an orderly way, to a car entrance to meet and assist his wife and family in alighting from the car and taking care of them and their belongings. Such a person has business of a perfectly legitimate character in respect to railway travel, and any official direction prohibiting reasonable enjoyment of the privilege would need to be in language unmistakable in that regard before it could be held to go that far, and then its validity might well be challenged, since the right to enjoy such privilege is well established by law. 2 Rorer, Railroads, 1130; Thompson, Carr. of Pass. 49; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 114, 54 N. W. 24; *Banderob v. Wis. Cent. R. Co.* 133 Wis. 249, 113 N. W. 738; *Doss v. Mo., K. & T. R. Co.* 59 Mo. 27; *Gillis v. Pa. R. Co.* 59 Pa. St. 129.

There was evidence, as indicated in the statement, tending to show that appellant assaulted respondent to prevent him from enjoying his foregoing stated lawful privilege. There was no justification, as the jury were warranted in finding, for violating respondent's person after notification of the perfectly legitimate purpose in mind. The act of pushing him back after being so notified and following it up with harsh treatment upon being defied for the unlawful interference, culminating in knocking him down with a club and incarcerating him in the jail, seems to have been without the slightest legal warrant, as the jury may well have found.

The foregoing amply shows that the case was rightfully submitted to the jury and upon the question of punitory as well as actual damages.

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A suggestion is made that the court erred in submitting to the jury the question of whether rules promulgated by the Interior Department of the federal government were reasonable. There was no such submission. Counsel's argument in that field seems to be purely academic. The language of the court's instruction, to which we are referred, must be read in connection with the evidence to which it applies. The only evidence there was of any regulation testified to have been violated was the direction by the Indian agent and Indian farmer to which we have referred. Were that as drastic as to justify the interference the jury found, and were warranted in finding, occurred, then appellant was not prejudiced by the reasonableness thereof being submitted to the jury, for it was unreasonable as a matter of law.

By the Court.—The judgment is affirmed.

TOWN OF EMERY, Respondent, vs. TOWN OF WORCESTER, Appellant.

November 28—December 15, 1908.

Towns: Detaching of territory and creation of new boundaries: Adjustment of pre-existing assets and liabilities: Actions: Conditions precedent: Pleading: Complaint: Demurrer.

1. Sec. 672, Stats. (1898), provides that whenever territory shall be detached from any town and annexed to another town, the town to which it is annexed shall receive from the town from which it was detached its just share of credits, "which shall be apportioned in the manner herein provided;" and an earlier part of the section provides that when a new town is created out of part of an old one, the county board shall, by the ordinance of division, apportion the indebtedness of the old town by dividing it *pro rata* according to the last assessment roll. *Held*, that thereby the power and duty is imposed on the county board to ascertain and determine the amount the town to which the detached territory is annexed is entitled to receive from the

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other town as the share of the latter's credits apportionable to the detached territory upon the basis of apportionment prescribed.

2. Such ascertainment by the county board is a condition precedent to the existence of any right enforceable in court to the share of the credits of the old town, since no right to any such share exists at common law and independent of this very statute.
3. In such case an attempted remission or delegation of the duty imposed on the county board to the two town boards is no compliance with the statute.
4. In such case where the complaint fails to allege such precedent action by the county board a demurrer should be sustained.

APPEAL from an order of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The complaint alleges that November 12, 1903, the county board of Price county by adoption of an ordinance to be in full force and effect after April 1, 1904, did change the boundary line between plaintiff and defendant towns by detaching certain territory from the defendant and annexing it to the plaintiff, which ordinance directed that the boards of supervisors of the respective towns shall meet as soon as convenient after the next annual meeting and apportion between the towns the resources and liabilities arising by reason of this change of boundaries, as provided by sec. 672, Stats. (1898); that such town boards have refused to make any such apportionment and that none has been made, either by the county board or by the town boards or any other tribunal; that the town of *Worcester* at the time of such change had certain specified assets and liabilities which, being offset, resulted in a total of credits held by the town of *Worcester* of $28,775; that upon apportionment upon the ratio of the assessed value of the detached and remaining portions plaintiff was and is entitled to receive from the defendant the sum of $4,842.86, which has been demanded and bill therefor duly filed with the town of *Worcester* and neglected to be allowed, wherefore recovery of that amount is prayed. Upon general demurrer by the defendant the court entered order overruling same, from which the defendant appeals.

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For the appellant there was a brief by *Wickham & Farr* and *Asa K. Owen,* and oral argument by *James Wickham.*

For the respondent the cause was submitted on the brief of *W. K. Parkinson.*

DODGE, J. The action of the county board in dividing the town of *Worcester* was by authority of sec. 671, Stats. (1898). By sec. 672, Stats. (1898), it is provided that whenever territory shall be detached from any town and annexed to another town, the town to which it is attached shall receive from the town from which detachment was made its just share of credits, "which shall be apportioned in the manner herein provided." An earlier part of the section provides for the apportionment of indebtedness when a new town is created out of part of an old one, and commands that such apportionment be made by the county board by their ordinance of division, and that the apportionment shall be in the ratio of the last assessed value of the two portions. It is contended by the defendant that this statute, and especially the quoted words therein, must be construed to require the apportionment of the assets or credits between the two towns by the county board in and by their ordinance of division and in the ratio above specified, while the plaintiff contends that the only significance of the last quoted words is to declare the ratio of the apportionment and that it requires no action of the county board, and hence that the right of the plaintiff to receive and duty of the defendant to pay a sum ascertained by such ratio is declared by the statute, and, on general principles, may be enforced by a court.

The words themselves, in their natural signification, apply rather to the operation by which the apportionment is made than to the ratio merely. It seems probable that, had the legislature intended merely to prescribe such ratio or basis of apportionment, some other word than "manner" would have been adopted, as, indeed, was done in the original of the legislation on the subject of apportionment of assets or cred-

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its (sec. 2, ch. 334, Laws of 1885), and as is done in the general section directing apportionment upon division of certain other municipal corporations and *quasi*-corporations (sec. 944, Stats. 1898). We have been unable to reach the conclusion that anything in the legislative history of sec. 672 or any use of similar phrases in other parts of the statutes is so significant of an intent differing from the literal meaning of the words as to justify departure therefrom. We conclude, therefore, that power and duty is imposed on the county board to ascertain and decide the amount which the plaintiff town is entitled to receive from the defendant as the share of the latter's credits apportionable to the detached territory upon the basis of apportionment prescribed.

Such ascertainment by the county board is clearly a condition precedent to the existence of any right enforceable in court to the share of the credits of the old town. No right to any such share existed at common law and independent of this very statute. *Depere v. Bellevue,* 31 Wis. 120; *Schriber v. Langlade,* 66 Wis. 616, 29 N. W. 547, 554; *Joint School Dist. v. School Dist.* 92 Wis. 608, 66 N. W. 794. Since the right rests upon statute, if a remedy is provided by the same statute it is exclusive. *May v. Black,* 77 Wis. 101, 45 N. W. 949; *Finney v. Guy,* 106 Wis. 256, 266, 82 N. W. 595. It is too clear for debate that the attempted remission or delegation of that duty to two town boards is no compliance by the county board with the statute. The conclusion is irresistible that no cause of action maintainable in court as yet exists in favor of the plaintiff against the defendant for any of the sums claimed in the complaint. The demurrer should have been sustained.

By the Court.—Order reversed, and cause remitted with directions to the trial court to sustain the demurrer.

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PETTINGILL and another, Appellants, vs. GOULET, Respondent.

November 28—December 15, 1908.

Replevin: "Timber:" Trespass: Measure of recovery.

Trees felled and cut into cordwood by a trespasser, which had attained such size as, in the use of forest products, to be commonly regarded as timber suitable for manufacture into a marketable product, are within the calls of sec. 4269, Stats. (1898), providing the rule for assessment of damages for wrongfully cutting timber.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action in replevin to recover possession of certain railroad ties and cordwood. The answer was a general denial. The sheriff seized forty cords of the wood; the defendant gave a redelivery bond, and this property was returned to him. The evidence showed that the wood was cut by the defendant from the plaintiffs' land. The defendant offered to permit plaintiffs to take judgment for the sum of $50 and costs. By direction of the court the jury found that the plaintiffs were entitled to the goods described in the complaint and that the defendant unjustly took and unlawfully detained the same. The question of value was covered by three findings in the verdict:

"(3) That the total value of said ties cut from timber upon plaintiffs' land is the sum of $16.60. (4) That the total value of the maple, oak, and birch cordwood stumpage before the same was cut by the defendant was $10.75. (5) That the value of said maple, oak, and birch firewood or cordwood was $140.50 after the same was cut."

Appellants objected to the admission of evidence of the stumpage value of the cordwood, and excepted to the ruling of the court in submitting this question to the jury. The court denied plaintiffs' motion for judgment for the value of

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the wood after it had been cut by the defendant, and ordered judgment in plaintiffs' favor for the value of the ties, together with the stumpage value of the cordwood before it was cut, with costs up to the time of defendant's offer of judgment. This is an appeal from the judgment so ordered.

The cause was submitted for the appellants on the brief of *C. F. Morris,* and for the respondent on a brief signed by *Ernest Sauve,* attorney, and *A. W. McLeod,* of counsel.

SIEBECKER, J. It is claimed that the court erred in restricting the damages caused by the felling and the removal of the trees, which were cut into cordwood, to their stumpage value, and in not holding that the value of the product of these trees, in the form of cordwood at the time it was replevied, was the true measure of damages. No exemplary damages are claimed, but it is urged that plaintiffs are entitled to have their damages assessed under the statutory rule declared in sec. 4269, Stats. (1898). This section provides that: "In all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff or to recover damages for such trespass the highest market value of such logs, timber or lumber," etc., shall be awarded the plaintiff. The words "logs, timber or lumber" must be understood as the legislature intended to apply them in view of the mischief sought to be remedied. This court in *Single v. Schneider,* 30 Wis. 570, held that, in replevin to recover the value of logs wrongfully cut and taken from plaintiff's land, the measure of recovery was the value of the property before it was improved by the defendant's labor and skill, unless the taking was accompanied by circumstances which justified the imposition of exemplary damages. At the next session of the legislature after the decision an act was passed which is substantially embodied in the present sec. 4269, Stats. 1898 (*Tuttle v. Wilson,* 52 Wis. 643, 9 N. W. 822), and which radically changed the

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measure of damages in actions to recover the possession or value of logs, timber, or lumber wrongfully cut upon plaintiff's land or for the recovery of damages for such trespass. In the instant case the trial court held that plaintiffs were not entitled to the measure of damages provided by this statute for the trees converted into cordwood, and therefore awarded recovery only for the stumpage value of the trees so felled and converted into cordwood.

The evidence discloses that the trees so felled and cut into cordwood had attained the size of trees which, in the use of forest products, are commonly regarded as timber suitable for manufacture into a marketable product. We are persuaded that the legislature intended that such trees, when wrongfully cut and removed, should be deemed within sec. 4269, Stats. (1898), and also intended by this section to grant the owner of them the right to recover the measure of damages provided therein, regardless of the condition into which they might have been converted by the trespasser. We perceive no good reason why the cordwood made from such trees should not be embraced within the statute. This application of the statute operates to accomplish the purposes of the law, and affords no more than a just relief to persons whose timber has been wrongfully felled and removed from their lands. Upon these considerations we are of opinion that plaintiffs were entitled, under the facts of this case, to recover the highest market value of the cordwood so cut out of such timber. This the jury found to be $140.50. Such measure of damages was applied in the following cases: *Brewster v. Carmichael,* 39 Wis. 456; *Haseltine v. Mosher,* 51 Wis. 443, 8 N. W. 273; *Gerhardt v. Swaty,* 57 Wis. 24, 14 N. W. 851.

The verdict of the jury specially finds the amount plaintiffs are entitled to recover under this statutory rule, hence no retrial of the action need be had. Judgment for the amount so found should have been awarded plaintiffs instead

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of the lesser sum found by the jury to be the stumpage value of the trees so converted.

By the Court.—The judgment is reversed, and the cause remanded to the trial court with directions to enter judgment in accordance with this opinion.

MARSHALL, J. (*concurring*). The question presented on this appeal is interesting and important to the administration of justice. A full history of the subject will demonstrate correctness of the construction now given to the statute. Wishing only to emphasize such correctness I write this supplementary opinion.

Quite early the rule was adopted here that in an action to recover for wood wrongfully taken at one place and removed to another, materially enhancing its value, the measure of recovery was the value at the time of taking, the question being reserved as to whether it would be the same in case of a wrongful taking by design. In the circumstances of the case it was held that full reparation was awarded the owner by such value, saving to the wrongdoer the added element representing his labor. *Weymouth v. C. & N. W. R. Co.* 17 Wis. 550. Later that was extended to an action for replevin for possession of logs made from trees wrongfully removed from plaintiff's land by the defendant (*Single v. Schneider,* 24 Wis. 299), where a return of the property could not be had, the question as to wilful trespasses being still reserved. In *Hungerford v. Redford,* 29 Wis. 345, that was affirmed. The evolution of the doctrine culminated in *Single v. Schneider,* 30 Wis. 570, extending it to wilful cutting and taking of timber. That was without precedent or logical support, in the judgment of the writer. I cannot believe that it would receive any favor now if the matter was open for original treatment.

That *Single v. Schneider, supra,* created an exceedingly embarrassing situation for owners of land in the great timber

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region of the state,—where in the very nature of things to prevent stealing of timber, which was common and profitable, was impracticable,—must be evident. It operated as a great stimulus to very annoying and damaging invasions of property rights. The novel rule was very beneficial to lawbreakers and very disadvantageous to owners of the wild and unoccupied land of the state.

As might have been expected, at the first opportunity the legislature was successfully invoked to provide some remedy for the condition described, resulting in ch. 263, Laws of 1873, to the effect that, as to wilful trespasses,—regardless of whether the remedial action was trespass, trover, or replevin to recover for logs, timber, or lumber cut from the land of the plaintiff, unless the property should be restored to the owner,—the damages should be "the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured," the same might be prior to the time of the trial.

It will be seen, at once, that the law, while very comprehensive, was yet quite ambiguous. Neither timber, logs, nor lumber, strictly speaking, is cut from land. Timber, in the sense of standing trees, is cut from land by severing the same therefrom. Logs are made from timber cut from land. Timber, in one sense, is the manufactured product of trees, but is commonly referred to as a part of the land. So the cutting of lumber from land is the cutting of trees therefrom. Lumber is made from logs, made from fallen timber, and in turn many things are made, directly or indirectly, therefrom.

So in the broad sense the law covered all products made by various methods of manufacture from trees, or timber cut from land. Only by giving that broad construction could the real mischief of the condition created by *Single v. Schneider, supra,* be removed. The clause, seeming to contemplate a restoration of the products of trees as a condition

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of escaping the penal rule of damages, left it uncertain as to whether the statutory rule of damages was absolute.

In that condition the revisers of 1878, endeavoring to clear up uncertainties, eliminated the restoration clause and changed the words "cut from" to "cut upon," making this explanation: "rewritten with an effort to state with more clearness and brevity the rules there prescribed." Note the language, "with an effort," indicating uncertainty as to whether the change did not yet leave the law ambiguous, which was well grounded, in my opinion. The uncertainty as to whether money damages should be the sole measure of redress was removed. The substitution of "cut upon" for "cut from" made it clear that the law covered the taking of down as well as standing timber, which was important, since there were large districts in the northern part of the state where valuable timber lay upon the ground as cast there by wind storms. But while the substitution cured one uncertainty it intensified another. Though, strictly speaking, timber in the sense of products of trees is not cut from land, *a fortiori* it is not commonly cut upon land where the raw material, the trees, are found. So the meaning as before is evidently logs, lumber, or timber, or the manufactured products obtained from land. The term "cut upon" with its context renders all the products referable to trees, whether standing or fallen, forming a part of the realty till disturbed by the trespasser. The words "whatsoever place, shape or condition" used to expand the term "logs, timber or lumber," followed by the words "manufactured or unmanufactured," makes it quite plain that all products of timber as of the time of the wrongful disturbance were intended, whether such products be in the form of saw logs, square timber, any species of lumber, cordwood, railroad ties, pulpwood, or any of many other things that might be mentioned.

That construction fully meets the mischief intended to be obviated and makes the statute a reasonable, sensible enactment. To take the statute literally would give it an un-

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reasonable and quite absurd meaning. The statutory rule would not apply in case of the severance of trees from the land and removal and use without changing the form. It would reach the trespasser if he converted the trees removed, into saw logs, timber, or lumber, upon the land. If he converted the trees into cordwood, railroad ties, pulpwood, stave bolts, fence rails, or any other of the many things that might be mentioned, it would not. The trees above the usable part for saw logs or timber, regardless of its value, would not be within the rule. In short, in case of a wilful trespass by the cutting down and removal of trees from land, though the damage to the owner would be unaffected by the use the trees might be put to, his rule of damages would be contingent upon the choice of the trespasser in that regard. It seems that no such unreasonable condition could ever have been thought of.

This court on the first occasion for dealing with the statute, as the revisers well knew at the time of their action, regarded it as above indicated. That is shown by *Webster v. Moe,* 35 Wis. 75, an action to recover for the value of trees wrongfully cut from plaintiff's land. Whether the trees were by the wrongdoer converted into saw logs, or cordwood, or some other product, does not definitely appear from the printed report of the case, or from the printed matter used on the appeal. The indications are, that was regarded as immaterial, as the law of 1873, if applicable at all, covered the taking of trees or any of the products thereof. Justice COLE, who wrote the opinion in *Single v. Schneider,* 30 Wis. 570, speaking for the court, said:

"The action was for a trespass in cutting down and removing pine trees," etc. . . . "But as soon as the decision in *Single v. Schneider* became known, the legislature passed ch. 263, Laws of 1873, prescribing what should be the measure of damages for the wrongful cutting of timber [trees]," and changed "the rule laid down in that case." *Webster v. Moe,* 35 Wis. 77, 79.

Manifestly, the word "timber" in the quoted language

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means the same as that word in the law and refers to trees. So the wrongful cutting of timber upon land looks to the severance of trees large enough to be called standing timber. The law was primarily aimed at such wrongful cutting of a wilful character, and secondarily to whatever product the trees might be manufactured into prior to the trial of the action.

Subsequent to the decision referred to the law was twice amended but not so as to affect the feature we have discussed (ch. 239, Laws of 1882, ch. 95, Laws of 1889), and it is now sec. 4269, Stats. (1898). It has been involved in numerous cases decided here without any suggestion being made out of harmony with what has been said. *Brewster v. Carmichael,* 39 Wis. 456; *Webber v. Quaw,* 46 Wis. 118, 49 N. W. 830; *Wright v. E. E. Bolles W. W. Co.* 50 Wis. 167, 6 N. W. 508; *Tuttle v. Wilson,* 52 Wis. 643, 9 N. W. 822; *Smith v. Briggs,* 64 Wis. 497, 25 N. W. 558; *Smith v. Champagne,* 72 Wis. 480, 40 N. W. 398; *Fisher v. Schuri,* 73 Wis. 370, 41 N. W. 527; *Everett v. Gores,* 89 Wis. 421, 62 N. W. 82; *Befay v. Wheeler,* 84 Wis. 135, 53 N. W. 1121.

BARNES, J. I concur in the foregoing opinion of Mr. Justice MARSHALL.

STATE EX REL. NELSON, Respondent, vs. EMERSON and others, Interveners, Appellants.

November 30—December 15, 1908.

Certiorari: *Scope of writ: Judgment to be entered: Record: Ministerial acts: Elections: Quashing writ.*

1. It is the settled rule in this state that a court, proceeding upon writ of *certiorari*, in giving final judgment can only affirm or reverse the judgment or determination reviewed under the writ.
2. On *certiorari* to review the acts of inspectors in canvassing the result of an election, no fact not shown or required to be shown

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by the election record can be considered, the court being confined to the record and debarred from considering extrinsic proof. Hence whether rejected ballots were or were not furnished by the municipal authorities is a question not before the court.

3. *Certiorari* to review the acts of inspectors in canvassing the result of an election would be ineffective and the writ should be quashed where a reversal of the determination of the inspectors would leave the election uncanvassed and undetermined, while the result as originally certified by the inspectors to the clerk of the municipality would remain in his office unaltered.

4. Acts of inspectors of elections in rejecting ballots as defective, as well as their subsequent canvass of the result, are ministerial rather than *quasi*-judicial acts and therefore cannot be reviewed on *certiorari*.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The appeal is from a judgment rendered upon *certiorari* to and reversing the decision of the inspectors of election of the village of Prentice relative to the results of an election upon the question of license or no license for retail liquor dealers in said town. The election was held April 7, 1908, in the duly organized village of Prentice, and prior to this charter election there was a petition as prescribed by law praying that the question of licensing persons to deal or traffic in spirituous, malt, or intoxicating liquors or drinks as a beverage be submitted to the electors of said village at the ensuing election, and such proceedings had that this question was properly submitted. The inspectors of the election canvassed the vote upon this question and determined and certified to the clerk of the village that the total number of votes cast upon this question was 126, of which number 25 votes were for license and 49 against, and 52 votes rejected as illegal. The last-mentioned ballots were preserved, and the relator, describing himself as a citizen and taxpayer and elector of the village of Prentice there engaged in the retail liquor business and having a large sum of money invested in that business, applied for and procured from the circuit court a writ of *certiorari* directed to the clerk of the village,

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alleging, in substance, that said fifty-two ballots were unlawfully rejected and that the canvass and decision of the board of inspectors was illegal and without jurisdiction, and void for this reason. The writ commanded that the village clerk certify and return to the circuit court the action and decision of said board of election inspectors and every matter and thing upon which said action and decision of said board was founded, and a correct transcript of so much of the proceedings of said board as relates to the submission of the question relative to liquor license, together with a copy of all files, papers, or entries recorded, entered, filed, or used in the possession or under the control of said clerk. On April 25, 1908, the village clerk made very full return to this writ.

The defendants *J. W. Emerson* and others were by order allowed to intervene as defendants and represent all of the petitioners for the submission to the electors of the license question aforesaid. These interveners moved to quash the writ of *certiorari,* their motion was denied, and upon the writ and return the circuit court adjudged that the foregoing decision of the election inspectors was manifestly erroneous and void in law, and that such decision "be and the same is hereby reversed."

For the appellants there was a brief by *Smart & Curtis* and *J. W. Hicks,* and oral argument by *E. M. Smart.*

Among other references upon the part of the appellants were the following: *State ex rel. Heller v. Fuldner,* 109 Wis. 56, 85 N. W. 118; *State ex rel. Gray v. Oconomowoc,* 104 Wis. 622, 80 N. W. 942; *State ex rel. Ennis v. Janesville,* 90 Wis. 157, 62 N. W. 933; *State ex rel. Wiesmann v. Kemen,* 61 Wis. 494, 21 N. W. 530; *State ex rel. Starkweather v. Superior,* 90 Wis. 612, 64 N. W. 304; *State ex rel. Schaefer v. Schroff,* 123 Wis. 98, 100 N. W. 1030; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex rel. Anderson v. Timme,* 70 Wis. 627, 36 N. W. 325; *Morris v. Ferguson,* 14 Wis. 266; *State ex rel. Moreland v. Whitford,*

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54 Wis. 150, 11 N. W. 424; *Hartwig v. Watertown,* 132 Wis. 83, 112 N. W. 21; *State ex rel. Mercer v. Sullivan,* 83 Wis. 416, 53 N. W. 677; *State ex rel. Guernsey v. Meilike,* 81 Wis. 574, 51 N. W. 875; *State ex rel. Swenson v. Norton,* 46 Wis. 332, 1 N. W. 22; McCrary, Elections, §§ 227, 229, 261–264.

For the respondent there was a brief by *Barry & Barry* and *C. E. Lovett,* and oral argument by *J. S. Barry.*

Among other references upon the part of the respondent were the following: *Gillespie v. Palmer,* 20 Wis. 544; *State ex rel. Drake v. Doyle,* 40 Wis. 175; *Byrne v. State,* 12 Wis. 519; 10 Am. & Eng. Ency. of Law (2d ed.) 707; *State ex rel. Schuetz v. Luy,* 103 Wis. 524, 79 N. W. 776; 15 Cyc. 384, 385; *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606, 93 N. W. 542; secs. 880, 4985, Stats. (1898); *State ex rel. Faber v. Hinkel,* 131 Wis. 103, 111 N. W. 217; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk,* 96 Wis. 73, 71 N. W. 86; sec. 783*b,* Stats. (Supp. 1906).

Timlin, J. By settled rules obtaining in this state, the court, proceeding upon writ of *certiorari,* in giving final judgment can only affirm or reverse the judgment or determination reviewed under the writ. *Starkweather v. Sawyer,* 63 Wis. 297, 23 N. W. 566; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777. The writ is therefore very ineffective in the instant case. There is no means of proving whether the rejected ballots were or were not furnished by the authorities, because that fact is not shown nor required to be shown by any election record, and the court on *certiorari* is confined to the record and debarred from extrinsic proof. To reverse the determination of the board of election inspectors would be to leave the result of the election uncanvassed and undetermined, while the result as originally certified by the inspectors to the village clerk would remain in his office unaltered. This is a condition not contemplated by

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statute. *State ex rel. Winchell v. Circuit Court,* 116 Wis. 253, 93 N. W. 16; 4 Decen. Dig. tit. CERTIORARI, and cases in sec. 8. The court is furthermore of the opinion that the acts of the inspectors in rejecting ballots as defective, as well as their subsequent canvass of the result, are both ministerial rather than *quasi*-judicial acts, and therefore, because the writ of *certiorari* cannot be used to review ministerial acts, the writ should have been quashed. *State ex rel. Narveson v. McIntosh,* 95 Minn. 243, 103 N. W. 1017; *State ex rel. Hadfield v. Grace,* 83 Wis. 295, 53 N. W. 444; 4 Decen. Dig. tit. CERTIORARI, § 24, and cases.

By the Court.—Judgment reversed, and the cause remanded with directions to quash the writ.

HYMAN, Respondent, vs. SUSEMIHL and others, Appellants.

November 30—December 15, 1908.

Newspapers: Statutory publication of official proceedings: Requirements as to language: Counties: Authority of county board: Appeal and error: Pleading: Demurrer: Answering over.

1. Where a statute either directs or permits a publication at public expense in the absence of language evincing a contrary intention such publication must be made in the legal language of the country.
2. The English language is the language of this country, to be used in all legal and official notifications and proceedings, in the absence of any statute authority to the contrary.
3. Sec. 674*a*, Stats. (Supp. 1906), requires every county board, by ordinance or resolution, to provide for one publication of a certified copy of all of its proceedings had at any meeting in a newspaper published and having a general circulation in its county, and sec. 675 authorizes publishing public notices relating to tax sales, redemption, and "other affairs of the county" in a newspaper printed in any other than the English language, under certain enumerated restrictions. *Held:*

   (1) If a county board desires to make publication in a foreign language it must look to the statutes for authority to do

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so, and in the absence of such authority the right to make a contract for such publication does not exist.

(2) Sec. 675, providing what publications a county board may make in a foreign language and prescribing the conditions that must exist before such publications can be made, excludes publications in a foreign language other than those mentioned, including its proceedings.

4. An order overruling a demurrer to a complaint providing that "plaintiff have judgment therein, but with leave to the defendants to withdraw their demurrer and put in an answer within twenty days," gives leave to the defendants to withdraw their demurrer if they choose and also gives leave to answer over, which latter right is not dependent upon the demurrer being withdrawn, and is not erroneous in requiring the withdrawal of the demurrer as a condition precedent to interposing an answer.

APPEAL from an order of the superior court of Lincoln county: ALMON A. HELMS, Judge. *Affirmed.*

This is an appeal from an order overruling two general demurrers interposed by different defendants to the complaint in the action. The plaintiff, as a taxpayer of Lincoln county, brings the action in his own behalf and in behalf of all other taxpayers of the county to enjoin the county board from directing the payment of any claim presented by the defendant *Otto Susemihl* for publishing the proceedings of said board in the German language, and also to enjoin the chairman of the board of supervisors and the county clerk from issuing or delivering to the defendant *Susemihl* any county order on account of such publication. The material part of the complaint sets forth that the defendant *Otto Susemihl* was and is the publisher of a newspaper printed in the German language; that at a meeting of the county board of said county held in November, 1906, at the solicitation of the said defendant *Susemihl,* the county board, by a majority vote, in behalf of the county, voted to enter into an agreement with said defendant *Susemihl,* by the terms of which he agreed to publish in the German language in said newspaper the proceedings of said board at the rate of twenty-

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five cents per folio; that no ordinance or resolution was adopted by the county board providing for such publication, and that no order was made by said board directing such publication, and no determination was made by said board before entering into the agreement referred to, to the effect that it was necessary for the better information of the inhabitants of the county that such proceedings should be published in some language other than the English language; that it does not appear from the last previous census that one quarter or more of the adult population of said county are of the German nationality not speaking the English language; that the defendant *Susemihl* is preparing to publish in the German language in the newspaper referred to the proceedings of the county board, pursuant to the action of the county board in making the aforesaid contract; that unless restrained the county board will audit and allow the claim for such publication and a county order will be issued pursuant to such allowance and will be paid by the county treasurer of the county, and it is further alleged that the claim for publishing said proceedings will amount to a considerable sum.

For the appellants there was a brief by *F. J. Smith* and *R. E. Smith,* and oral argument by *F. J. Smith.*

John Van Hecke, for the respondent.

BARNES, J. Ch. 298, Laws of 1901 (sec. 674*a*, Stats.: Supp. 1906), provides that:

"The county board of supervisors in every county in the state of Wisconsin, shall, by ordinance or resolution, provide for one publication of a certified copy of all its proceedings had at any meeting, . . . in one or more newspapers published and having a general circulation therein. . . ."

Sec. 675, Stats. (1898), provides, among other things, that:

"The county board may order public notices relating to tax sales, redemption and other affairs of the county to be published in a newspaper printed in any other than the Eng-

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lish language, to be designated in such order, whenever they shall deem it necessary for the better information of the inhabitants thereof, and it shall appear from the last previous census that one fourth or more of the adult population of such county are of a nationality not speaking the English language, and that there shall have been a newspaper published therein continuously for one year or more in the language spoken by such nationality; provided, that all such notices shall also be published in a newspaper published in the English language as provided by law. . . ."

It is alleged in the complaint and admitted by the demurrer that it does not appear from the last census of Lincoln county that one quarter or more of the adult population of such county are of a nationality not speaking the English language, and it is conceded by the appellants that the contract for the publication of the board proceedings cannot be sustained under the provisions of sec. 675, the material part of which is quoted above. It is contended by appellants that sec. 674*a* is wholly independent of sec. 675, and contains the requisite authority for the board to make the contract in question. It is asserted by the respondent that the words, "and other affairs of the county," contained in sec. 675, are broad enough to and do include county board proceedings, and that because of such provision such proceedings can only be published in a foreign language when the prerequisite conditions prescribed by sec. 675 in fact exist. If this were the only objection to the contract in question we would hardly consider it tenable. If this contract could be made under sec. 674*a* were it not for the occurrence of the words above quoted in sec. 675, we would hesitate to say that it is not valid.

While there seems to be a dearth of authority upon the subject, the decided cases, as far as we have been able to discover, are in harmony and are to the effect that where a statute either directs or permits a publication at public expense, in the absence of language evincing a contrary intention, such publication must be made in the legal language of the country. To this effect are the cases of *Road in Upper*

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Hanover, 44 Pa. St. 277; *Graham v. King,* 50 Mo. 22; *Richardson v. Tobin,* 45 Cal. 30; *Tyler v. Bowen,* 1 Pittsb. Rep. (Pa.) 225; *Kratz's Appeal,* 2 Pittsb. Rep. (Pa.) 452; *Chicago v. McCoy,* 136 Ill. 344, 26 N. E. 363. The value of the latter case as authority is minimized by the fact that the constitution of the state of Illinois provides that all laws of that state and all official writings and executive, legislative, and judicial proceedings shall be published in the English language and no other. This constitutional provision was held to apply to the publication under consideration by the court, but it is apparent from the language in the opinion that the same result would follow if there were no such constitutional provision.

This court has decided that, where a statute directs certain acts and proceedings of city councils to be published in a newspaper, the requirement of the statute is fulfilled by making the publication in a newspaper printed in a foreign language, provided such official act or proceeding is printed in such paper in the English language. *Kellogg v. Oshkosh,* 14 Wis. 623. It has also been held that the publication of a summons, under a statute authorizing its publication in a newspaper most likely to give notice to the defendant, might be made in a paper printed in a foreign language, provided the publication of the summons was made in the English language. *Wakeley v. Nicholas,* 16 Wis. 588.

The utmost that has been decided in the cases referred to is that where a statute either authorizes or directs a publication to be made in a newspaper, and is silent as to the language in which such paper must be printed, publication may be made in a newspaper habitually printed in a foreign language, provided the publication authorized or directed is made in the English language. Instead of these decisions sustaining the view of the appellants, the inference therefrom is strong that publication in a foreign language would not meet such a statutory requirement as the one under con-

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sideration. There is no warrant, aside from that contained in sec. 675, which we have been able to discover, either in the statutes or in the decisions, for applying any different rule in the case of a discretionary publication than that which appellants concede is applicable to the mandatory one.

The only other case in this court bearing upon the subject under consideration is *State ex rel. Goebel v. Chamberlain*, 99 Wis. 503, 75 N. W. 62. In that case the court said:

"The English language is the language of the country, to be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary."

Unless this declaration is held to be an incorrect statement of the law, and is overruled, it is manifest that the demurrers in this case were properly overruled. It is not claimed that sec. 674*a* gives any express authority to publish the board proceedings in a foreign language, and neither is it claimed that any other statute of the state confers such authority, excepting sec. 675, and it is admitted that the contract does not come within the provisions of that statute. If a county board desires to make a publication in a foreign language, it must look to the statutes for authority so to do, and, in the absence of such authority, the right to make a contract for such publication does not exist. Furthermore, sec. 675, providing what publications a county board may make in a foreign language, and prescribing the conditions that must exist before such publications can be made, shows a legislative intent to exclude publications in a foreign language other than those provided for.

The order appealed from overrules the demurrers interposed in the action, and provides that "plaintiff have judgment therein, but with leave to the defendants to withdraw their demurrers and put in an answer within twenty days." It is said that the order is erroneous in that it requires a withdrawal of the demurrers as a condition precedent to in-

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terposing an answer. We do not so construe the order. It does not require the withdrawal of the demurrers under penalty of a forfeiture of the right to answer. Leave is given the defendants to withdraw their demurrers if they choose, but leave is also given to answer over, which is not dependent upon the demurrers being withdrawn.

By the Court.—The order appealed from is affirmed.

JAMES MUSIC COMPANY, Respondent, vs. HANKWITZ, Appellant.

November 30—December 15, 1908.

Chattel mortgages: Legal title after condition broken: Trespasser: Right as against unfiled chattel mortgage.

1. A chattel mortgagee, after condition broken, has the legal title to the mortgaged property and the right to the possession thereof.
2. Under sec. 2313, Stats. (1898), providing for the filing of chattel mortgages and the effect of such filing, the owner of an unfiled chattel mortgage can recover the mortgaged property from a mere trespasser.

[3. *It seems* that the provisions of sec. 2313, Stats. (1898), are intended only for the protection of those claiming the mortgaged property by purchase, assignment, or otherwise from the mortgagor in possession, and not for the protection of mere trespassers.]

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Ryan & Runke,* and oral argument by *R. S. Runke.*

For the respondent there was a brief by *Brown, Pradt, Genrich & Anderson,* attorneys, and *Edward M. Smart,* of counsel, and oral argument by *F. W. Genrich.*

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WINSLOW, C. J. No statement of the facts in this case is deemed necessary. But one question is involved which we deem it necessary to consider, viz.: Can the owner of an unfiled chattel mortgage, after condition broken, successfully replevin the mortgaged property from a person who has purchased the same at sheriff's sale upon an execution issued on a judgment against one other than the chattel mortgagor? In simpler form, the question is whether such a mortgagee can replevin the property from a trespasser. This question must be answered in the affirmative. A chattel mortgagee after condition broken has the legal title to the mortgaged property and the right to the possession thereof. *Klinkert v. Fulton S. & M. Co.* 113 Wis. 493, 89 N. W. 507.

It is true that sec. 2313, Stats. (1898), provides that a chattel mortgage shall not be valid as "against any other person than the parties thereto," unless the possession of the property be delivered to and retained by the mortgagee, or the mortgage be filed in the office of the proper town, city, or village clerk, as prescribed in sec. 2314, Stats. (1898). Under this section it is contended that the owner of an unfiled chattel mortgage cannot recover the property from a mere trespasser. This contention, however, must be rejected under the authority of *Kimball v. Post,* 44 Wis. 471, where it was held that the same language in sec. 2317, Stats. (1898), with reference to conditional sales of personal property, was intended only for the protection of those claiming the property by purchase, assignment, or otherwise from the vendee in possession, and not for the protection of mere trespassers.

Following this decision the judgment must be affirmed.

By the Court.—It is so ordered.

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LARSON, Respondent, vs. Foss, Appellant.

November 30—December 15, 1908.

Master and servant: Existence of relation: Evidence: Sufficiency: Agency: Trial: Instructions to jury: Special verdict: Sufficiency.

1. In an action to recover on a contract for personal services, the evidence, stated in the opinion, is *held* to establish a contract upon the showing of actual authority of defendant's son in the matter, or of apparent authority and reasonable reliance thereon, or of assumption of such authority and reliance thereon followed by ratification by defendant.
2. In an action to recover on a contract for personal services, an instruction as to the question of how long a period plaintiff was promised by defendant's son he should receive the increased wages claimed, though not very happily worded, is *held* to be free from any error, and not so phrased that the jury could reasonably have been misled.
3. In an action to recover on a contract for personal services, the special verdict, stated in the opinion, is *held* to have sufficiently covered the case to save the judgment from being disturbed for prejudicial error as to the form of the verdict.
4. A finding of a special verdict, in an action for personal services, that plaintiff worked a specified number of days as foreman, he having been originally hired as a common laborer, is *held* to have sufficiently informed the court how long plaintiff worked at the second employment, where the necessary inference from the findings, with the undisputed evidence, was that all the work defendant did as foreman was under the second contract.

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

Action to recover on contract for personal services. The controversy was as to the amount due and involved two counterclaims.

There was evidence to the effect that defendant, while running a general lumbering business with his son Louis in charge as general foreman, employed plaintiff to work in the woods at $32 per month, doing common labor; that after working nine days Louis set plaintiff at work in the capacity of foreman, increasing his wages to $40 per month; that he

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continued at work as foreman in the woods and defendant's mill yard without anything further being said about compensation till the time of settlement between the parties; that defendant then insisted plaintiff was only entitled to $32 per month, and that Louis had no authority to change the contract, while plaintiff claimed he was entitled to $40 per month. There was evidence tending to show that Louis had general charge of the work, hiring and discharging men, fixing wages, and acting in the capacity of general agent, and that defendant knew soon after plaintiff commenced as foreman of the fact in that regard and made no suggestion but that the change met with his approval. Both defendant and his son testified that the latter had no authority to make the alleged bargain, but Louis admitted he put plaintiff in the position of foreman, promising him additional wages. There was a conflict between Louis and plaintiff as to when the bargain was made and as to the amount of the increased wages agreed upon and the length of time the latter worked as foreman. The jury found in plaintiff's favor, rendering a special verdict, as follows: The contract at first was for wages at $32 per month. Plaintiff worked nine days under such contract. Defendant's son, assuming to act in his behalf, then made a new contract with plaintiff that he should work as foreman and receive $40 per month. Plaintiff was promised the $40 per month as long as he acted as foreman. He so acted 371 days. Defendant knew plaintiff was acting as foreman under a contract made with Louis. Plaintiff had good reason to believe Louis had authority to make the contract. Defendant is entitled to credit of $3.50 on the first counterclaim and $36.61 on the second. In accordance with this verdict judgment was rendered in plaintiff's favor for $141.75, with costs.

For the appellant there was a brief by *Reid, Smart & Curtis,* and oral argument by *E. M. Smart.*

John Van Hecke, for the respondent

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MARSHALL, J. As will be seen by the statement, the case was submitted to the jury, supposing there was evidence tending to prove appellant's son, either acting by apparent or mere assumption of authority, made the alleged contract with respondent; that the latter, in reasonable belief of such authority existing, joined in the agreement; that appellant, thereafter, with knowledge of such facts as reasonably charged him with notice of the existence of some new agreement, the benefit of which he was enjoying, confirmed respondent in his impression as to the son's authority by not raising any objection to the change, and that he thereby ratified it.

There can be no question but that it was competent for respondent under the pleadings to establish the contract sued on, either by showing actual authority of appellant's son in the matter, or apparent authority and reasonable reliance thereon, or assumption of such authority and such reliance and ratification by appellant. It is the opinion of the court that there was sufficient evidence to establish the contract on either of the two theories the case was submitted on, and that some evidence allowed under objection, to which our attention is called, was competent in that view.

The case is very simple, as regards assignments of error respecting the form of the verdict and rulings on objections to and motions to strike out evidence. They are all covered, in general, by what has been said and are not of sufficient dignity, as appears to us, to require any detailed or extensive treatment.

The court instructed the jury as to the question of how long a period plaintiff was promised by appellant's son he should receive the increased wages:

"You must find from the evidence . . . and be satisfied what it was, and if there is no evidence to satisfy you as to what it was, you must reconsider carefully the whole evidence and from such evidence conclude if you can as to what the answer to that question should be. . . ."

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Counsel for appellant argue that the jury ought to have been told that they should be satisfied from the preponderance of the evidence as to what their answer should be, and instructed as to the burden of proof.

The instruction was not very happily worded, but we are unable to discover any error therein, or that the jury could reasonably have been misled. They doubtless understood they were required to determine the specific time agreed upon, if any, and if they were unable to find there was such time, they should determine from the whole evidence the proper answer to the question. True, to have spoken accurately, the court should have admonished the jury that they were required to reach a conclusion to a reasonable certainty, or be satisfied, of the truth as to the controversy from the preponderance of all the evidence bearing thereon. But the instruction was correct, so far as it went. It plainly told the jury, in effect, that in answering the question they should be satisfied from all the evidence in the case bearing thereon that their answer was in accordance with the right of the controversy. That was sufficient so long as appellant maintained silence as to desiring more explicit instructions. *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377. There was no request therefor. If counsel desired such they should have requested the same in writing at the proper time. *Hacker v. Heiney,* 111 Wis. 313, 87 N. W. 249; *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837; *McCummins v. State,* 132 Wis. 236, 241, 112 N. W. 25. Under the circumstances on this point appellant has no legal ground for complaint.

The point is made that the verdict does not fully cover the issues on the theory of its submission, for want of a finding that respondent, in contracting with appellant's son, relied upon his apparent authority in that regard, or any finding that the son was held out by appellant as having the authority he assumed to exercise. True, the verdict was not as

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skilfully framed as it might have been. It would have been more orderly and comprehensive to have submitted a question as to holding out by appellant, one on reasonable reliance thereon by respondent; one on what the contract was which resulted; one as to the amount unpaid for the services rendered, and to round out the verdict on assumption of authority and ratification, by appellant's silence with knowledge of the fact, two questions on those subjects. However, from the question as to assumption of authority, the one as to reasonable ground for belief in the existence of authority in fact, and the one that appellant knew of the radical change in respondent's work, with the undisputed evidence as to silence, supporting the answer respecting notice that the change was based on new contract relations, sufficiently covered the case to save the judgment from being disturbed for prejudicial error as to the form of the verdict.

Further objection is made that the verdict failed to inform the court how long respondent worked under the second contract; that the finding that he worked 371 days as foreman is not sufficient. That is hypercritical. The necessary inference from the findings, with the undisputed evidence, that all the work respondent did as foreman was under the second contract, covers the point.

Nothing further need be said. It is not thought best to burden the records with a discussion of the evidence, pointing to features thereof upon which the jury might reasonably have reached the conclusion which they did. As before indicated, it is the opinion of the court that such features significantly appear.

By the Court.—Judgment affirmed.

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NELSON, Respondent, vs. A. H. STANGE COMPANY, Appellant.

November 30—December 15, 1908.

Master and servant: Personal injury: Questions for jury: Setting aside directed verdict.

In an action by a servant for personal injuries it is *held* that the questions of negligence and contributory negligence or assumption of risk were properly for the jury, and that the trial court did not err in setting aside on that ground a verdict which, at the close of the evidence, it had directed for the defendant.

APPEAL from an order of the superior court of Lincoln county: ALMON A. HELMS, Judge. *Affirmed.*

The plaintiff, an adult, who had worked for many years about wood-working factories, but not with machinery, was set to work by defendant at running small blocks of wood through a circular rip-saw, which, it was claimed, lacked adequate precautions to prevent flying pieces of wood from injuring the operator. A splinter was thrown by the saw into the plaintiff's eye, to its complete destruction. At the close of the evidence the court first directed verdict for the defendant, but, on motion for a new trial, concluded that there was evidence which should have been submitted to the jury, and, therefore, that such direction was erroneous, and for such error set aside the verdict and ordered a new trial. From that order this appeal is brought.

For the appellant there was a brief signed by *Edward P. Vilas,* of counsel, and *Vilas & Vilas,* attorneys, and oral argument by *C. A. Vilas.*

For the respondent there was a brief by *Thomas J. Mathews* and *Humphrey Barton,* and oral argument by *Mr. Barton.*

DODGE, J. This appeal presents nothing but questions of fact. Of course, if there was credible evidence upon the material issues of the case which to any reasonable mind

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might have supported the contentions of the plaintiff, the court erred in directing a verdict, and was in duty bound to set aside that verdict upon motion. If, however, there was no such evidence, the court erred in setting aside the verdict on the ground of his own error, it being made apparent that he did not award the new trial in his discretion.

The detail of the particular facts of an individual case can be of but little general interest nor serve as precedent with much force. We cannot believe any important purpose will be subserved by a discussion thereof in an opinion, when they are fully within the minds of parties and counsel, to whom alone they are of importance. After careful examination we find ourselves unable to say, in contradiction of the court's conclusion, that there was no evidence, either on the subject of defendant's negligence or of assumption of the risk or act of contributory negligence by the plaintiff, which might not, construed as it might have been by reasonable minds and in the light of certain demonstrative or real evidence, which was before the jury and the trial court and is not before us, have tended to establish that defendant failed to provide safeguards which were so feasible and practical as to be reasonable and tended to warrant the conclusion that plaintiff was not so informed of the peril to him from operating the saw that he assumed the risk from which he suffered injury, and that his acts were not so in disobedience of instructions given him by his employer, nor so variant from what might have been expected of an ordinarily prudent person under like circumstances, that they would constitute contributory negligence.

By the Court.—Order appealed from is affirmed.

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STATE EX REL. CONLIN, Appellant, vs. MAYOR AND COMMON COUNCIL OF THE CITY OF WAUSAU and others, Respondents.

December 1—December 15, 1908.

Intoxicating liquors: Violation of excise laws: Intent: Agent of licensee: Appeal and error: Mandamus *to compel revocation of liquor license: Determination after expiration of license period: Costs.*

1. Under a statute prohibiting a licensee to sell or give away intoxicating liquors to minors without the written authority of parent or guardian, and providing that for such a violation the license shall be subject to revocation, the licensee's intent respecting alleged violations of the statute is not an essential factor in the offense.
2. While the system of regulation of intoxicating liquors grants the licensee the privilege of conducting his business through an agent, it also imposes on the licensee the affirmative duty to see to it that every regulation is obeyed by his agents as well as himself. Hence such a licensee is answerable for the acts of his agents (barkeepers) though he is absent from his place of business and had instructed those agents not to make forbidden sales.
3. Where a barkeeper, in the absence and without the knowledge of the saloonkeeper and in violation of instructions not to sell to any minor, such instructions being a condition of his employment, sold intoxicating liquors to a minor, the saloonkeeper is guilty of a violation of sec. 1558, Stats. (1898), and it becomes the duty of the body issuing him his license to revoke it.
4. On *mandamus* to compel the revocation of a liquor license it appeared, among other things, that the license period had expired before the cause was heard on appeal from a judgment, entered during the life of the license, erroneously denying the writ. *Held*, that the relator is entitled to a reversal of the judgment with costs and to have judgment for costs in the trial court.

APPEAL from a judgment of the municipal court of Marathon county: LOUIS MARCHETTI, Judge. *Reversed.*

This is an action of *mandamus* to compel the mayor and common council of the city of *Wausau* to revoke the license of one Fred Brand, a duly licensed saloonkeeper of the city,

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it being alleged that he unlawfully sold intoxicating liquors to a minor. Complaint was made to the mayor and common council that Brand had sold intoxicating liquor to a minor without a written order from his parents or guardian. A hearing was ordered upon the petition and Brand was summoned to appear and show cause why his license should not be revoked. At the hearing there was evidence that Brand was a duly licensed saloonkeeper, that a bottle of beer had been sold by his barkeeper to the minor, and that the minor did not have a written order from his parents or guardian. It was shown that the barkeeper who was in charge of the saloon at the time of the sale had been given strict instructions not to sell to any minor, that this was a condition of his employment, and that the sale by him was without the knowledge or consent of Brand. The common council refused to revoke the license. The guardian of the minor thereupon instituted this action in the municipal court for a peremptory writ of *mandamus* to command the mayor and common council to revoke the license. The petition in substance alleges the facts as above stated. The court issued an alternative writ commanding the mayor and council to revoke the license or to show cause why they should not revoke it. In the return to the writ the facts as stated above were admitted, and it was further stated that the refusal of the council to revoke the license was based on the fact that the council was of the opinion that Brand was not liable for the act of the barkeeper in selling to the minor against instructions, and that this was a good defense to the complaint. The relator demurred to the return, and the court upon motion entered judgment dismissing the action and quashing the alternative writ. This is an appeal from such judgment.

For the appellant there was a brief by *Brown, Pradt, Genrich & Anderson,* attorneys, and *M. B. Rosenberry,* of counsel, and oral argument by *F. W. Genrich.*

For the respondents there was a brief by *Franklin E.*

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Bump, of counsel, and *H. H. Manson,* city attorney, and oral argument by *Mr. Bump.*

SIEBECKER, J. As appears from the foregoing statement of facts, the common council found that the licensee was not guilty of an unlawful sale of intoxicating liquor because the sale was made by an employee while the licensee was absent from his place of business, against his positive instructions and contrary to his directions to the employee not to sell liquors to persons to whom sales were forbidden by law. The trial court held that the respondent, as licensee, was not guilty of violating the law. This conclusion was manifestly based on the assumption that the licensee was not responsible for acts of his employee which violated sec. 1558, Stats. (1898), if committed by the employee in the absence of the proprietor and against *bona fide* instructions not to conduct the business in violation of the law. The statute enacts in effect that, if the licensee shall sell or give away intoxicating liquors to minors without the written authority of parent or guardian, his license shall be subject to revocation in the manner provided. The licensee's intent respecting alleged violations of the law is not an essential factor in the case. In the case of *State v. Hartfiel,* 24 Wis. 60, this court held that an unlawful sale of intoxicating liquors to a minor is a violation of the law prohibiting such sales, though the vendor is ignorant of the fact that the purchaser is a minor. It is there declared that "where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation" (citing), and that "police and other laws and regulations for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted, are of this nature, for the law in these cases seems to bind the party to know the facts and to obey

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the law at his peril." To the same effect is *State ex rel. Higgins v. Beloit,* 74 Wis. 267, 42 N. W. 110.

The statutes regulating the sale of intoxicating liquors show an intent by the legislature to prevent the mischief which accompanies an unrestricted traffic, and were obviously enacted to impose the specified restrictions on the traffic with a view to protect the public against such evils. To accomplish this it appears to have been deemed good policy to impose on the licensee the obligation that he, his employees and agents, be required to conduct the business conformably to the regulations prescribed by law. *Nelson v. State,* 111 Wis. 394, 87 N. W. 235. While the system of regulation grants the licensee the privilege of conducting the business through an agent, it also imposes on him the affirmative duty to see to it that every regulation is obeyed by his agents as well as by himself. The court in the case of *Carroll v. State,* 63 Md. 551, 3 Atl. 29, wherein the question of the licensee's responsibility for an unlawful sale of intoxicating liquor to a minor by his barkeeper during his absence, without his knowledge and authority and contrary to his instructions given in good faith, was considered, held, where intent is not an ingredient of such an offense, "that it must be immaterial whether such orders are given or not, for he who does by another that which he cannot lawfully do in person must be responsible for the agent's acts. In fact, it is his act." It seems that if the licensee is not excusable when personally conducting the business, if he be deceived or is ignorant of violations regarding forbidden traffic, he cannot escape the consequences of such violations by his agents to whom he has intrusted the conduct of his business. We are persuaded that the legislation on the subject makes the licensee answerable for the acts of his agents, though he was absent from the place of business and had instructed the agent not to make forbidden sales. The following cases support this rule: *State v. Kittelle,* 110 N. C. 560, 15 S. E. 103; *State v. Constatine,* 43 Wash. 102.

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86 Pac. 384; *People v. Lundell,* 136 Mich. 303, 99 N. W. 12; *Dudley v. Sautbine,* 49 Iowa, 650; *Noecker v. People,* 91 Ill. 494. The consequence is that upon the undisputed facts the trial court should have commanded the common council to revoke the license. *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672, 70 N. W. 300; *State ex rel. McKay v. Curtis,* 130 Wis. 357, 110 N. W. 189.

The license sought to be revoked expired in July, 1908. Under these circumstances no writ of *mandamus* will now issue. Since, however, the trial court erred in denying the writ during the life of the license, relator is entitled to a reversal of the judgment with costs and to have judgment for costs in the trial court. *State ex rel. Treat v. Hammel,* 134 Wis. 61, 114 N. W. 97.

By the Court.—Judgment reversed, and the cause remanded with directions to the trial court to award judgment in accordance with this opinion.

MOOTZ and wife, Appellants, vs. PETRASCHEFSKI and wife, Respondents.

December 1—December 15, 1908.

Vendor and purchaser: Contract for support: Construction: Condition subsequent: Counterclaim: Equitable relief: Specific performance: Necessary parties: Rescission by vendor: Improvements by vendee: Measure of values.

1. A contract under which defendants deeded farm lands to plaintiffs in consideration of support provided, among other things, that the defendants should have three rooms in the house with plaintiffs on the farm, but, in case they should desire to live with one of their other children, articles required to be delivered to defendants under the contract were to be delivered at the abode of the defendants, which should not be more than twenty miles from the farm, and, "should the parties concerned

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not agree," then the plaintiffs should pay the defendants $1,000 "and be released from all other obligations." *Held*, in view of the close connection between the provision relating to the payment of the $1,000 and the language respecting failure to agree, that the idea of payment was coupled with the failure to agree after removal from the farm and the new conditions arising after the defendants had gone to live with other children, and hence the right to pay and be released arose only under such circumstances. KERWIN, TIMLIN, and BARNES, JJ., dissenting, are of the opinion that any failure to agree, whether the defendants remained under the plaintiffs' roof or not, entitled the plaintiffs to pay the $1,000 and be released from all further obligations to the defendants.

2. In such case, plaintiffs having breached the contract before they commenced the instant action for leave to pay into court the $1,000 and for judgment declaring the contract satisfied, the defendants' right to rescission was complete and they were entitled to enforce such right under their counterclaim.

3. Under such contract plaintiffs having also agreed to pay to a daughter of defendants, upon her arriving at the age of eighteen years, $450, it is *held* that the daughter should have been made a party and permitted to defend, so that she might be bound by the judgment.

4. Where, pending a contract for support in consideration of a conveyance of lands, the vendee made permanent improvements with the vendor's consent, on rescission of the contract on account of the vendor's breach of a condition subsequent the vendee is entitled to be allowed the ascertained reasonable value of the improvements, not exceeding the actual cost.

APPEAL from a judgment of the municipal court of Marathon county: LOUIS MARCHETTI, Judge. *Reversed.*

The defendant *Carolina* is the wife of defendant *Friedrich Petraschefski,* and plaintiff *Lydia* is the wife of plaintiff *Otto Mootz* and daughter of defendants. On the 29th day of February, 1904, plaintiffs and defendants entered into the following agreement:

"Articles of agreement and entered into this twenty-ninth (29th) day of February, A. D. 1904, by and between *Friedrich Petraschefski* and *Carolina Petraschefski* (his wife), of the town of Hamburg, in the county of Marathon, and state of Wisconsin, parties of the first, and *Otto Mootz* and

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Lydia Mootz (his wife), parties of the second part, of the same town, county, and state aforesaid, witnesseth: That the parties of the first part, for and in consideration of the covenants and agreements on the part of the party of the second part, hereinafter named, do hereby agree to transfer their right, title, and interest in and to the following described piece of land, to wit: The west one-half (W. ½) of the southwest quarter (S. W. ¼) of section number four (4), in township number thirty (30) north, of range number five (5) east, said to contain eighty (80) acres of land according to the United States government survey, be the same more or less, situated in the county of Marathon and state of Wisconsin. And said parties of the first part have this day, in pursuance thereof, signed and transferred the above described piece of land to the said parties of the second part, by warranty deed, and in further consideration for the covenants and agreements on the part of the parties of the second part, hereinafter mentioned, said parties of the first part agree to turn over and deliver to the party of the second part all their personal property, including horses, cattle, and tools and agricultural implements, excepting their household effects, two cows, and two sheep, which they reserve only as long as they live for themselves as long as either of the parties of the first part shall live.

"In consideration whereof, the said parties of the second part hereby agree to deliver for the use of the said parties of the first part annually at such times as demanded or set forth herein, the following named articles, pay the following named sums annually and otherwise designated, and assume to said first parties all the obligations hereinafter named, to wit: Said party of the second part is to pay annually to the parties of the first party thirty (30) dollars cash and furnish them thirty (30) bushels of good sound potatoes, two hundred (200) pounds of good young pork, one hundred (100) pounds of good young beef, three (3) barrels good wheat flour, three (3) dozen of good fresh eggs per week from the first (1st) day of March until the fifteenth (15th) day of November in each year, also to allow them the use of one half (½) acre of land manured, plowed, dragged, and prepared ready for planting a garden for their use annually, to feed and keep for them two (2) cows, and two sheep (2),

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and their wool annually, and in case of sickness the party of the second part must see that the cows are properly fed and milked and the milk brought into the house where the party of the first part live. Also allow them the use of one horse, when they wish to use it, hitch it up ready to get into the vehicle, and also unhitch it and take care of it when they return, also allow them six young cockerels killed and dressed for eating annually, and when we are sick, we must be attended to and cared for, and have our washing done, and also furnish us with sufficient firewood, split and cut ready for the stove.

"It is further agreed that the parties of the second part shall pay our daughter Emma, now Mrs. Wm. Langhoff, the sum of four hundred and fifty ($450) dollars, and when our daughter Otilia becomes eighteen years of age the parties of the second part are to pay her four hundred and fifty ($450) dollars, and if they cannot then pay it they must pay her interest at the rate of five (5) per cent. per annum until paid.

"It is further agreed to and by both parties that the parties of the first part shall have the use of three (3) rooms in a house upon the farm to live in as long as they live, and in case they ever should decide to live with one of their other children then the party of the second part is to deliver the foregoing mentioned articles to their abode, but not over twenty miles away from the said farm. Should the parties concerned not agree, then the parties of the second part shall pay the parties of the first part one thousand (1,000) dollars, and be released from all other obligations. In case of death the party of the second part must give the parties of the first part a good religious burial under the rites of the Lutheran church, under the custom of the community.

"And it is also agreed by both parties that the hereby assigned and set over farm cannot be sold during their natural lives without the consent of the parties of the first part. And as security for the faithful performance of each and all the agreements and covenants on the part of the parties of the second part towards said parties of the first part, said first parties shall have a lien upon the premises conveyed by said parties of the first part to said parties of the second part.

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"In witness whereof the said parties have hereunto set their hands and seals this 29th day of February, A. D. 1904.

"FRIEDRICH his mark × PETRASCHEFSKY. [Seal.]
"KAROLINA PETRASCHEFSKY. [Seal.]
"OTTO MOOTZ. [Seal.]
"LYDIA MOOTZ. [Seal.]

"In presence of
"Henry E. Voight.
"Christ F. Schmidt.

"State of Wisconsin,
"Marathon County. } ss.

"On this 29th day of February, A. D. 1904, personally appeared before me the within named *Friedrich Petraschefsky* and *Karolina Petraschefsky,* his wife, and *Otto Mootz* and *Lydia Mootz,* his wife, to me known to be the persons who signed the within agreement, and acknowledged the same to be their own deed and act for the uses and purposes therein mentioned. HENRY E. VOIGHT, Notary Public.

"(N. B.) Residing in Hamburg, Marathon Co., Wis.

"[Seal.] My commission expires June 4, 1905.

"Recorded Mar. 3, A. D. 1904, at 2 p. m., volume 98 of Deeds, page 34. EDW. C. KRETLOW, Register."

On or about June, 1907, this action was commenced. The complaint alleges that pursuant to the agreement heretofore set forth the deed of the premises was executed and delivered and that plaintiffs went into possession of the premises and paid Mrs. Langhoff $450 specified in the agreement, and erected on the premises a house costing to exceed $1,500, and gave the defendants rooms therein which they occupied, and made other valuable improvements, and that they complied in all respects with the terms of the contract, and that ever since the spring of 1906 it has been impossible for the parties to agree, owing entirely to the defendants; that before the commencement of this action plaintiffs offered to pay defendants and tendered them $1,000 in satisfaction of the agreement, and ever since have been ready and willing

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to pay said sum to the defendants, and, in addition to said $1,000, are willing to pay Otilia Petraschefski $450. Plaintiffs demand judgment that they be permitted to pay $1,000 into court for defendants, and that the agreement be declared satisfied except the payment of $450 to Otilia, and that the agreement be canceled except as to said $450, and the title to the land adjudged in plaintiffs subject to a lien of $450. The defendants answered, admitted the relationship of the parties, the execution of the agreement, that plaintiffs went into possession under the agreement, and the payment of $450 to Mrs. Langhoff, and denied the other allegations of the complaint. Defendants also set up a counterclaim, alleging breach of the contract on the part of plaintiffs, and demand judgment dismissing the complaint and that they have judgment upon the counterclaim rescinding and canceling the deed, and that the property be restored to them and their title established free and clear of any right or claim of the plaintiffs.

The action was tried by the court, and the court found, in substance, the execution of the agreement and conveyance of the property to plaintiffs, and further found that:

"By the terms of said agreement it was provided that, if the parties to the contract could not agree, the plaintiffs should pay to the defendants the sum of $1,000 and be released from all other obligations. And this sum of $1,000 was tendered by the plaintiffs to the defendants in March, 1907, and prior to the commencement of this action. Since the making of said contract and prior to the commencement of this action the plaintiffs cut from the premises so conveyed to them by the defendants certain timber and removed and sold the same, the value of which, after deducting the cost of the labor of the plaintiffs thereon, was $200, for which the plaintiffs are liable and should be charged as waste. During the occupancy of said farm by the plaintiffs they built upon the same a dwelling house of the reasonable value of $1,150. Prior to the commencement of this action and prior to the tender of the $1,000 set forth in finding 3,

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the plaintiffs at various times violated the obligation of their said contract with the defendants to treat the defendants with the consideration and forbearance due from children to parents, by neglecting to give to the defendant *Carolina Petraschefski,* the mother of the plaintiff *Lydia Mootz,* proper nursing and care or any nursing and care whatsoever whilst she was sick on two occasions, and by the refusal of said plaintiff *Lydia Mootz* to speak to said defendant, her mother, for a long period, causing said defendant much mental pain and grief, and by an assault by the plaintiff *Otto Mootz,* whilst in an intoxicated condition, upon the defendant *Friedrich Petraschefski* in the rooms belonging to said defendants, and in the nighttime, in which said plaintiff used violent, abusive, and threatening language towards the said defendant, which assault greatly disturbed and alarmed the defendants, and especially the defendant *Carolina Petraschefski.* On said occasion also said plaintiff *Otto Mootz* demanded that the defendants leave the place. The personal property delivered by the defendants to the plaintiffs has been converted by the plaintiffs to their own use, so that it cannot be returned to the defendants, and the value of the same, which is $450, offsets and counterbalances the payment of $450 made by the plaintiffs to Mrs. William Langhoff. The difference between the value of the house constructed by the plaintiffs upon said premises and the waste of said premises for which they are chargeable and plaintiffs' use of the farm is $950, for which the defendants are justly chargeable and liable to plaintiffs."

As conclusions of law the court found that:

"By the violation of the condition subsequent, set forth in findings 1 and 6, of the deed from the defendants to the plaintiffs of the premises described in finding 1, the title to said premises so conveyed was diverted from the plaintiffs and reverted to the defendants. The defendants are entitled to a decree declaring the contract and deed set forth in finding 1 to be set aside and canceled, and adjudging the title of said real estate to be in the defendants free and clear of any claim, right, or title of the plaintiffs in the same and dismissing the action of the plaintiffs. Said judgment shall provide for the payment to the plaintiffs by the defendants

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of the sum of $950 within sixty days from the date of said judgment, and that such sum and judgment shall remain and constitute a lien upon the real estate described in finding 1 until the same is paid."

Judgment was entered adjudging the defendant *Friedrich Petraschefski* the owner of the land and premises in question and also adjudging the contract void; and further, that the defendants pay the plaintiffs $950 within sixty days from the date of entry of judgment and that plaintiffs have a lien upon the premises for said sum, and their action against defendants be dismissed with costs. Plaintiffs appealed from this judgment.

John Van Hecke, for the appellants.

For the respondents there was a brief by *Brown, Pradt, Genrich & Anderson,* and oral argument by *F. W. Genrich.*

KERWIN, J. This action was brought upon the theory that in case the parties failed to agree the plaintiffs might pay $1,000 and be released from all obligations under the contract, except the payment to Otilia Petraschefski of $450, the $450 provided for Mrs. Langhoff having been paid by plaintiffs before the action was commenced. The contention of the parties involves the construction of the agreement set up in the statement of facts. The court found failure to agree, and also that prior to the commencement of the action and the tender of the $1,000 the plaintiffs at various times violated the obligations of the contract by failing to furnish nursing and care and otherwise. These findings, we think, are supported by the evidence. The question therefore arises whether the breach was a breach of a condition subsequent which entitles the defendants to rescind and re-enter for condition broken and thereby become repossessed of their former estate, under the rule of *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Krause v. Krause,* 125 Wis. 337, 104 N. W. 76; *Gall v.*

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Gall, 126 Wis. 390, 105 N. W. 953. It is the opinion of Justices TIMLIN, BARNES, and the writer that the doctrine of the foregoing cases does not apply to the instant case, but that any failure to agree, whether defendants remained under the plaintiffs' roof or not, entitled plaintiffs to pay $1,000 and be released from all further obligations to the defendants. The majority of the court, however, think otherwise. The question turns upon the intention of the parties as gathered from the contract. What the intention was depends upon the construction of the contract and whether it is capable of an interpretation which will bring the case within the rule of the cases heretofore cited. The contract provides that the defendants shall have the use of three rooms in the house with plaintiffs upon the farm, but, in case they should desire to live with one of their other children, in such event the articles to be delivered under the contract were to be delivered at the abode of the defendants, which should not be more than twenty miles from the farm, and, "should the parties concerned not agree, then the parties of the second part shall pay the parties of the first part one thousand dollars and be released from all other obligations." It is considered by the court that, in view of the close connection between the provision to pay $1,000 and the language respecting failure to agree, the idea of payment is coupled with the failure to agree after removal from the farm and new conditions arising after the defendants had gone to live with other children, and that the right to pay and be released should arise only under such circumstances. This appears to the court, under all the provisions of the contract and circumstances surrounding the parties at the time of its execution, to be a more reasonable interpretation than that it was intended that while all the parties were living together under the same roof, and no decision on the part of the defendants to live elsewhere, the plaintiffs, in case of disagreement, could tender $1,000 and send the defendants from under their roof. The court

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therefore is of the opinion that the parties to the contract intended that the $1,000 was to be paid in case disagreement occurred after defendants had gone to live elsewhere, and, they not having done so, the right to pay the money and be released never arose. Besides, the contract does not provide that the money may be paid and plaintiffs released for breach on their part, but only in case of failure to agree. The plaintiffs having breached the agreement before the commencement of the action, the defendants' right to rescission was complete, and the defendants were entitled to enforce it under their counterclaim. *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Gall v. Gall,* 126 Wis. 390, 105 N. W. 953.

It is further contended that it was error to find the value of the timber cut $200, the value of the house built by plaintiffs $1,150, and in requiring the defendants to pay plaintiffs only $950. It also appears from the evidence that the plaintiffs made valuable improvements in addition to building the house, principally by way of fences, for which no allowance was made. It also appears that, in order to determine the rights of all parties, Otilia Petraschefski, daughter of defendants, should have been made a party, since the contract provided that she be paid $450 upon arriving at the age of eighteen years. *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440. It is quite clear that the plaintiffs should have been allowed more than $950. The clear preponderance of the evidence shows that the reasonable cost of the house was more than $1,150; but it would be difficult if not impossible, from the condition of the evidence, to arrive at the reasonable cost, and there is no evidence from which the cost of the fences could be determined. So, because of the condition of the record, this court cannot finally dispose of the case.

In order to do so, Otilia, daughter of defendants, must be made a party and permitted to defend, so that she may be bound by the judgment, and further testimony taken upon

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the accounting, to the end that it may be definitely settled as to the amount which should be charged to plaintiffs for timber cut upon the premises, and the reasonable cost of the house built by plaintiffs on the premises as well as other improvements ascertained, and the amount to be paid by defendants to plaintiffs determined. The improvements having been made by consent of both parties to the contract, in arriving at the amount to be allowed to plaintiffs for such improvements the ordinary rule does not apply, but the reasonable value of the improvements, not exceeding the actual cost, should be ascertained and allowed.

By the Court.—The judgment of the court below is reversed, and the action remanded for further proceedings in accordance with this opinion.

WISCONSIN RIVER IMPROVEMENT COMPANY, Respondent, vs. PIER and another, imp., Appellants.

December 1—December 15, 1908.

Eminent domain: Jurisdiction of superior court of Lincoln county: "Actions and proceedings:" "At law and in equity:" Public and private laws: Subjects and titles: Constitutional provisions: Corporations: Corporate existence: Presumptions: Public utilities: "Public use:" "Private use:" "Public:" Delegation of power of eminent domain: Dams in aid of navigation: Surplus power created: Public-service corporations: Navigable waters.

1. Ch. 295, Laws of 1905, relating to the superior court of Lincoln county, invests that court with jurisdiction equal to and concurrent with the circuit court for Lincoln county "in all civil actions and proceedings at law and in equity," and also provides that, whenever any statute mentions the circuit judge or judge of the circuit court, these words shall be deemed to apply to the judge of such superior court. *Held:*

   (1) The words "actions and proceedings" together cover all remedies to be obtained in courts.

   (2) The words "at law or in equity" embrace all exercise of judicial or *quasi*-judicial power on the part of courts, whether

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the power be conferred upon courts by statute, common law, or equitable rules.

(3) The power conferred upon the circuit court or the judge thereof by ch. 292, Laws of 1880 (authorizing the Wisconsin River Improvement Company to exercise the power of eminent domain), is under ch. 295, Laws of 1905, conferred upon the superior court of Lincoln county and upon its judge.

2. Ch. 292, Laws of 1880, is entitled "An act to amend ch. 171, P. & L. Laws of 1868, entitled 'An act to incorporate the Wisconsin River Improvement Company, and to amend ch. 298, Laws of 1876, amendatory thereof.'" In this title there is, first, a false description wherein the amended act is designated as ch. 171, P. & L. Laws of 1868, when it should be described as ch. 171, P. & L. Laws of 1866; second, a correct description of ch. 298, Laws of 1876, which latter contains the same false description in its title, but also purports to amend ch. 171, P. & L. Laws of 1866; and third, a correct description of the subject of the law sought to be amended, as "An act to incorporate the Wisconsin River Improvement Company." *Held*, assuming that ch. 292, Laws of 1880, is private or local, that it is not invalid because the subject of the act is not expressed in its title (sec. 18, art. IV, Const.), since neither the casual hearer nor the investigator would be misled and the constitutional requirements are satisfied.

3. Where the charter of a corporation is not in evidence and no special charter is shown, it will be presumed that it was organized under the general incorporation statutes.

4. The Wisconsin River Improvement Company, incorporated under a special charter, was authorized to improve the Wisconsin river in such manner as it should deem expedient or advisable, from Stevens Point to the headwaters of that river, and was given authority to erect and maintain dams and to acquire by condemnation proceedings land along the river for the purpose of facilitating and cheapening the driving and floating of logs, timber, and lumber in the river. At a time when the driving and floating of logs in the Wisconsin river was very much diminished from its former proportions, the Improvement Company entered into a contract with the Tomahawk Power Company, a corporation formed for the purpose of heating, lighting, or furnishing power or signals by electricity, whereby the latter corporation was to construct dams and river improvements in the territory within which the Improvement Company was authorized to act, at its own expense, and in consideration thereof the Power Company was to reimburse and profit itself by the sale of power. *Held:*

(1) In so far as the Tomahawk Power Company is a corpo-

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ration organized to furnish power, that authority and duty is distinct from any other corporate authority it may have assumed by any additional provisions in its articles.

(2) Under ch. 499, Laws of 1907 (sec. 1797*m*—1, Stats.), the public are entitled to use and enjoy the power created by dams and improvements upon its navigable rivers, not as a mere favor or by mere permission of the owner, but by right.

5. In such case by "the public" is meant, not the whole population of the state, but all persons who require power and are willing to pay reasonable rates therefor.
6. "Public use" is not synonymous with "public benefit."
7. A corporation possessing the power of eminent domain, to be exercised in aid of navigation by the construction of a dam, after entering into a contract for the construction of a dam with a public-service corporation, whereby the latter was to construct the dam solely at its own expense and to have all the profits arising from the sale of power generated at the dam and the former to retain its right to collect the tolls arising from navigation and retain control and management of the improvement for all purposes of navigation, may exercise such right of eminent domain, although the rates for power will probably exceed the tolls for navigation, and the corporation possessing the power of eminent domain would probably not have voluntarily exercised that right had it not made such a contract.
8. In such case the value of the improvement to navigation is not to be measured alone by the probable amount of tolls to be received; nor does the fact that the revenues to be derived from the sale of power may largely exceed the tolls to be derived from navigation furnish the test of which is the incidental and which is the primary purpose of the improvement so far as public interests are concerned.
9. A dam may be as effectual in aid of navigation in a case where the owner can get it built by foregoing or assigning his right to some collateral use of the dam as in a case where he is obliged to put his own money into the construction.
10. The extent to which a dam will benefit navigation is not to be measured by its cost nor the motives which impel its construction.
11. Where the public use justifies the erection of a dam, and the dam, in addition to subserving its public purpose, incidentally causes a surplus of water available for power and for private use, the public use is not thereby impaired or destroyed.
12. Public-service corporations are at all times answerable to the state for nonfeasance or misfeasance in their obligations to the public.

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13. A corporation, authorized as an incident to improving a navigable river to construct a dam, cannot maintain such dam as an impediment to navigation or as only useful for generating power.
14. In proceedings to condemn lands for flowage to be created by a dam to be erected in aid of navigation, the evidence failed to show that the dam was to be constructed or the land to be taken for any private use. *Held*, that the creation of an additional public use of generating and distributing power did not make unlawful the condemnation proceedings.

APPEAL from an order of the superior court of Lincoln county: ALMON A. HELMS, Judge. *Affirmed.*

The appeal is from an order refusing to vacate an order made by the judge of said court appointing commissioners in a condemnation proceeding.

For the appellants there was a brief by *Caroline H. Roemer*, attorney, and *Quarles, Spence & Quarles* and *George Lines*, of counsel, and oral argument by *T. W. Spence.*

Among other references upon the part of the appellants were the following: *Powers v. Bears*, 12 Wis. 213; *State v. Hogue*, 71 Wis. 384, 36 N. W. 860; *Western Union R. Co. v. Dickson*, 30 Wis. 389; *Eaton v. Williams*, 51 Wis. 99, 7 N. W. 838; *Baker v. State*, 56 Wis. 568, 14 N. W. 718; *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214, 49 N. W. 971; *Verges v. Milwaukee Co.* 116 Wis. 191, 93 N. W. 44; *State ex rel. Vandenhouten v. Vanhuse*, 120 Wis. 15, 97 N. W. 503; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; *In re Theresa D. Dist.* 90 Wis. 301, 63 N. W. 288; *Att'y Gen. v. Eau Claire*, 37 Wis. 400; *Maginnis v. Knickerbocker I. Co.* 112 Wis. 385, 88 N. W. 300; sec. 1777*a*, Stats. (1898); *Wis. W. Co. v. Winans*, 85 Wis. 26, 54 N. W. 1003.

For the respondent there was a brief by *Smart & Curtis*, and oral argument by *E. M. Smart.*

Among other references upon the part of the respondent were the following: *Wis. Cent. R. Co. v. Cornell Univ.* 49 Wis. 162, 5 N. W. 331; *In re Fleming's Petition*, 16 Wis.

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70; *In re Incorporation of North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *Att'y Gen. v. West Wis. R. Co.* 36 Wis. 466; *Black River Imp. Co. v. Holway,* 87 Wis. 584, 59 N. W. 126; *Diana S. Club v. Lamoreux,* 114 Wis. 44, 89 N. W. 880; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Pratt v. Brown,* 3 Wis. 603; *Mills v. Charleton,* 29 Wis. 400; *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295; *Chicago & N. W. R. Co. v. Morehouse,* 112 Wis. 1, 87 N. W. 849; Lewis, Em. Dom. § 166; *Kuehn v. Neroz,* 131 Wis. 610, 111 N. W. 724.

TIMLIN, J. *Kate Pier* and other owners of land sought to be condemned are appellants, and the *Wisconsin River Improvement Company* respondent.

1. The appellants first challenge the jurisdiction of the judge of the superior court of Lincoln county, and also that of said superior court, to appoint commissioners in condemnation proceedings, contending that ch. 292, Laws of 1880, under which this proceeding was brought, assuming it to be a valid statute, confers that power only upon "the circuit court or the judge thereof." But ch. 295, Laws of 1905, relating to the superior court of Lincoln county, invests that court with "jurisdiction equal to and concurrent with the circuit court of Lincoln county in all civil actions and proceedings at law and in equity," with an exception not relevant here. If we could consider the words "all civil actions and proceedings at law and in equity" as restrictive and as imposing a limitation upon the jurisdiction so as to confine the authority of the superior court of Lincoln county to proceedings in actions at law and proceedings in suits in equity, this construction would be permissible, and perhaps proper; but the words "actions and proceedings" have by statute an extended significance, so that they together cover all remedies to be obtained in courts. Secs. 2594, 2596, Stats. (1898). So the words "at law and in equity" embrace all exercise of

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judicial or *quasi*-judicial power on the part of courts, whether that power be conferred upon the courts by statute, common law, or equitable rules. The expression used in the statute must be construed as extensive and general rather than restrictive and particular. This broad grant of jurisdiction is followed by express authority to issue all commissions provided by law, and there is also in the act a provision that whenever any statute of this state shall mention the circuit judge or judge of the circuit court, etc., these words shall be deemed to apply to the judge of the superior court of Lincoln county. We therefore hold that, assuming ch. 292, Laws of 1880, to be a valid law, the power there conferred upon the circuit court or the judge thereof is, by ch. 295, Laws of 1905, conferred upon the superior court of Lincoln county and upon the judge thereof.

2. It is next contended that ch. 292, Laws of 1880, is a private or local act and invalid because the subject of the act is not expressed in its title. Const. art. IV, sec. 18. The title of the act is: "An act to amend ch. 171 of the Private and Local Laws of 1868, entitled 'An act to incorporate the *Wisconsin River Improvement Company,* and to amend ch. 298 of the Laws of 1876, amendatory thereof.'" Ch. 171, P. & L. Laws of 1868, is not entitled "An act to incorporate the *Wisconsin River Improvement Company,*" does not relate to that subject at all, but is an act to authorize the town of Springfield, Dane county, Wisconsin, to establish and maintain a high school. Ch. 298, Laws of 1876, contains in its title the same erroneous reference to ch. 171 of the Private and Local Laws of 1868, but also purports to amend ch. 171, Private and Local Laws of 1866, which last-mentioned act is entitled "An act to amend ch. 30 of the Private and Local Laws of 1853, entitled 'An act to incorporate the *Wisconsin Improvement Company.*'" In the body of the last-mentioned act the corporation is, however, described as the *Wisconsin River Improvement Company.* There was a

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statute of 1868 amending the charter of the *Wisconsin River Improvement Company,* but it was ch. 394 instead of ch. 171; so, also, there was a statute numbered 171 amending the charter, but it was enacted in 1866 as aforesaid and not in 1868.

It will thus be seen that in the title to the act of 1880 there is, first, a false description of ch. 171, P. & L. Laws of 1868; second, a correct description of ch. 298, Laws of 1876, which latter contains a false description; and third, a correct description of the subject of the law sought to be amended, as "An act to incorporate the *Wisconsin River Improvement Company.*" The body of the act of 1880 expressly confers on the *Wisconsin River Improvement Company* authority to erect and maintain dams at such places as may seem advisable on the Wisconsin river between certain designated points, and to acquire by condemnation proceedings land along the banks of the Wisconsin river for the purpose of facilitating and cheapening the driving and floating of logs, timber, and lumber in said river. Application to the court is necessary, and the court upon such application is required to determine whether said company is entitled to take the whole or any part of the land sought to be acquired. This is similar to the language found in sec. 1847, Stats. (1898). By ch. 194, Laws of 1895, the respondent's corporate existence was recognized, and it was authorized to improve the Wisconsin river in the manner provided in the original act of 1853, or in such other manner as it might deem expedient or advisable, from Stevens Point, Portage county, to the head waters of the Wisconsin river. Assuming, without deciding, that the act of 1880 is private or local, is the subject of that act expressed in the title? The subject of the act is an amendment to the charter of the *Wisconsin River Improvement Company* by conferring thereon the powers aforesaid. The title expressly declares that it is to amend a law entitled "An act to incorporate the *Wisconsin River Improvement Company,*" but describes the

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latter statute, which it purports to amend, incorrectly, by reference to the chapter number of the act and the year of its passage. There is in this way a reference in the title of the act to its subject, but coupled with a false description. Two very ancient maxims of the common law are applicable: *Falsa demonstratio non nocet*" (Broom, Leg. Max. 7th ed. 629 *et seq.*); *Utile per inutile non vitiatur*" (Id. 627). *Madison, W. & M. P. Co. v. Reynolds,* 3 Wis. 287; 26 Am. & Eng. Ency. of Law (2d ed.) 559–583.

Applying another test, it seems to us that any one reading this title would be at once informed that it expressed the subject of the act, which is an amendment to an act incorporating the *Wisconsin River Improvement Company* and also an amendment to an amendment of that act. Upon further inquiry he would find that the statute of 1868 referred to in the title of the act of 1880 was not entitled as described in the title of the act of 1880; but the same investigation would bring him to ch. 298, Laws of 1876, which would direct him to the original incorporation act, namely, ch. 30, P. & L. Laws of 1853. Thus he who made no investigation, but heard the title read, would be informed that the act of 1880 was an act to amend the corporate charter of the *Wisconsin River Improvement Company,* and he who made full investigation would inevitably ascertain the exact and true condition of the statutes relative to this corporation. Therefore neither the casual hearer nor the investigator would be misled, and the requirements of the state constitution are satisfied.

3. It is next argued that the condemnation in question is sought for a private and not for a public purpose; that the private use is the principal or paramount use to be derived from the erection of the dam in question and the real purpose for which this condemnation is sought. To maintain this contention it is said that the only public purpose which can be considered in the condemnation proceedings in question is the improvement of the river for the purpose of facilitating

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and cheapening the driving and floating of logs, timber, and lumber, and that the evidence submitted by respondent on the hearing fails to show that the dam and consequent overflow in question can have this effect. It is further argued that the only purpose of the respondent in the attempted exercise of its power of eminent domain is the creation by means of the proposed dam of a great water power to be sold or used commercially, directly or by electric transmission, at the adjacent cities of Merrill and Tomahawk, and therefore this resort to condemnation proceedings is not in aid of the corporate powers given to or possessed by respondent, but a mere subterfuge through and by means of which the respondent exercises its delegated power of eminent domain, ostensibly for the improvement of the Wisconsin river, but really for the private advantage and gain of the Tomahawk Power Company, a private corporation organized under ch. 86, Stats. (1898).

It was shown that at a meeting of the directors of the *Wisconsin River Improvement Company* on November 5, 1907, a proposed form of contract between that company and the Tomahawk Power Company was submitted for consideration and discussion. Thereupon a resolution was adopted:

"That it be deemed expedient and advisable to improve the navigation of the Wisconsin river between the city of Rhinelander, Wisconsin, and the city of Tomahawk, Wisconsin, by constructing a dam across said river at such height as the president and secretary may determine on sections 25 and 36, in township 35 north, range 6 east, and another dam across the Wisconsin river on sections 1 and 12, in township 35 north, of range 7 east, in Lincoln county; said dams to be provided either with a proper and sufficient lock or marine railway or slide for the safe and convenient passage of boats and other water craft up and down said stream over or through said dam."

The proposed contract between the *Wisconsin River Improvement Company* and the Tomahawk Power Company was then approved and ordered to be executed. It was re-

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corded at length as a part of the minutes of the meeting, and recited that the *Wisconsin River Improvement Company* deemed it advisable to improve the navigation of the Wisconsin river from Tomahawk, Wisconsin, to Rhinelander, Wisconsin, and deemed it most expedient to make such improvements by constructing a dam at least fifteen feet in height and not more than twenty-five feet in height as described in the resolution above quoted, and then proceeded as follows:

"Whereas, said dams and improvements will incidentally create water power through use of the surplus water not necessary for the purpose of navigation; and whereas, the Tomahawk Power Company, a Wisconsin corporation, located at Tomahawk, Wisconsin, is desirous of owning such water power to be erected by use of such surplus water, and has begun to acquire the sites for said dams and the major portion of the lands necessary to be overflowed or otherwise used therewith: Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the *Wisconsin River Improvement Company,* party of the first part, and the Tomahawk Power Company, party of the second part, enter into this agreement."

Then follows the agreement whereby the Tomahawk Power Company binds itself: (1) To make surveys to determine what lands shall be necessary for location of improvements and flowage; (2) to acquire title in its own name to so much of said land as it could purchase at a reasonable price and contribute the use of such land to the enterprise without charge, but to remain the owner of the land; (3) to pay all expenses incurred in carrying on condemnation proceedings for acquiring land and to pay all damages and compensation required to be paid to the owners of the land so taken and all other necessary expenses; (4) to construct and equip in a substantial and permanent manner and put in successful operation such dams with suitable slides or chutes, a lock or system of locks, or a marine slide or railway, as it should elect, of sufficient strength and capacity to pass over, through,

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or around said dam, either up or down stream, boats, barges, and other water craft fifty feet in length, ten feet in beam, and drawing five feet of water; (5) to maintain all such improvements in good condition and repair; (6) to have the perpetual right to use in any manner it sees fit all surplus water not needed for navigation, and to raise the said dam at any time permanently or temporarily, but not so as to interfere with navigation, and not exceeding the maximum height aforesaid; (7) to construct in connection with said dam and other improvements all necessary head-races, tail-races, wheel pits, flumes, and other works, and all buildings and power plants necessary for the proper utilization of said surplus water; (8) to assume all liability provided for in ch. 236, P. & L. Laws of 1878, to the owners of any and all property for any damage to such property caused by improper construction of the works of improvement, etc. And the *Wisconsin River Improvement Company* binds itself: (1) To proceed immediately to acquire title or right to overflow the necessary lands by condemnation as provided in its charter, and carry such condemnation proceedings to final conclusion; (2) at its own expense to operate the locks or marine slide, and to do all necessary sluicing of logs, etc., to fix and collect according to law and its charter all tolls and other charges for the use of such improvements on account of navigation.

The evidence fairly supports the inferences from the foregoing contract that the Tomahawk Power Company constructs the dams and river improvements for the *Wisconsin River Improvement Company* at the expense of the former, and in consideration thereof is to reimburse and profit itself by the sale of power. The cost of the first dam will be about $40,000 and it will produce a maximum of about 3,000 horse power. The driving or floating of logs in the Wisconsin river at this point had, prior to and at the time of making this contract, very much diminished from its former proportions. Appellants, in support of their contention aforesaid,

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cite *Fallsburg P. & Mfg. Co. v. Alexander,* 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129; *Avery v. Vt. E. Co.* 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817; *Brown v. Gerald,* 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472; *Minn. C. & P. Co. v. Koochiching Co.* 97 Minn. 429, 107 N. W. 405. To get a definite basis for the examination of the real questions before this court, we must first ascertain whether the furnishing and sale of power originated or created by a dam on a navigable stream is a public use.

The articles of incorporation of the Tomahawk Power Company are not in evidence, but it was said on the argument to be a corporation organized under ch. 86, Stats. (1898). No special charter having been shown, we may presume it was organized under this general incorporation statute. Ch. 86, Stats. (1898), authorizes three or more adult persons, residents of this state, to form a corporation in the manner provided in that chapter to conduct, pursue, permit, or maintain any one or more of the purposes specified. Among those specified we find that of furnishing power, also "heating or lighting or furnishing power or signals by electricity or otherwise." This Tomahawk Power Company may, it is true, under its articles and in conformity to ch. 86, *supra,* have other corporate authority, but that is immaterial. So far as it is a corporation organized to furnish power, that authority and duty is distinct from any other corporate authority which it may have assumed by additional provisions in its articles, if such there be. By ch. 499, Laws of 1907 (sec. 1797*m*—1, Stats.), "the term 'public utility' as used in this act shall mean and embrace every corporation . . . that now or hereafter may own, operate, manage or control any plant or equipment or any part of a plant or equipment within the state for the . . . production, transmission, delivery or furnishing of . . . power either directly or indirectly to or for the public. . . . Every utility is required to furnish reasonably adequate service and facilities." This

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must mean to such of the public as require this service and imposes the duty to serve the public.

"The charge made by any public utility for any heat, light, water or power produced, transmitted, delivered or furnished, or for any telephone message conveyed or for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful."

Provisions then follow requiring the Railroad Commission to value all the property of such corporation, requiring the corporation to keep and render to the Commission accounts of all business transacted. The Commission is to prescribe the form of books and accounts to be kept, and the corporation is to keep no other books or accounts of its business. It must close its accounts annually and report to the Railroad Commission, who may examine and audit all its accounts, test its appliances for measuring power, etc., enter upon its premises, fix its rates or charges when found to be unjust, unreasonable, insufficient, unjustly discriminatory, or preferential, etc.

There can be no doubt of the power of the legislature to impose such further duties and liabilities upon such corporation as it sees fit, at least with respect to property to be acquired or duties to be undertaken by such corporation after the enactment of the statute. The result of this is that the cases above referred to cited by appellants are not in point, nor is the use of the Tomahawk Power Company a private use. By the statute above quoted the public are entitled to use and enjoy the power created by this dam, not as a mere favor or by mere permission of the owner, but by right. The charges of the Power Company are to be reasonable and to be regulated by the public authorities. These are the tests of a public use. *Shasta P. Co. v. Walker,* 149 Fed. 568; *Minn. C. & P. Co. v. Pratt,* 101 Minn. 197, 112 N. W. 395; also cases cited for appellants *supra.* By the public is

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meant, not the whole population of the state, but all persons who require power and are willing to pay reasonable rates therefor to the full extent of the capacity of the enterprise in question. See, also, *Allaby v. Mauston E. S. Co.* 135 Wis. 345, 116 N. W. 4. Public use is not synonymous with public benefit.

We may now more accurately restate the question raised by the evidence as follows: Can a corporation possessing the right of eminent domain to be exercised in aid of navigation by the construction of a dam, after entering into a contract for the construction of the dam with a public-service corporation, whereby the latter is to construct the dam solely at its own expense and to have all the profits arising from the sale of power generated by the dam and the former is to retain the right to collect the tolls arising from navigation and retain control and management of the improvement for all purposes of navigation, exercise such right of eminent domain, it appearing that the rates for power will probably largely exceed the tolls for navigation, and that the corporation possessing the right of eminent domain would probably not have voluntarily exercised that right had it not made such a contract? In the first place, the value of the improvement to navigation is not to be measured alone by the probable amount of tolls to be received, nor does the fact that the revenues to be derived from the sale of power may largely exceed the tolls to be derived from navigation furnish the test of which is the incidental and which the primary purpose of the improvement so far as public interests are concerned. In weighing the motives of the parties these comparisons would be all-important; but a dam may be as effectual in aid of navigation in a case where the owner can get it built by foregoing or assigning his right to some collateral use of that dam as in a case where he is obliged to put up his own money for the construction. The extent of the benefit to navigation cannot be measured by the cost of the dam nor the motives which impelled its construction. Had

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the Wisconsin River Improvement Company advanced this $40,000 and constructed this dam, its charter permitting, it could itself enjoy these reasonable emoluments to be derived from the sale of power. In that case the prospective profits from the sale of power might be a powerful, or indeed the only, motive or inducement for it to perform its duty in building the dam; but the court cannot for that reason deny the right to build the dam if the dam was really in aid of navigation. Instead of doing this, it procures the dam to be built in consideration of a transfer of this right to collect rates for power which it might itself either withhold from the public or enjoy. It seems to us there is no substantial difference whether the respondent built the dam by advancing its own funds or procured it to be built in the manner here shown, provided the navigation of the river will not be impaired by the use of the dam for generating power, and provided that the dam will be as effective in aid of navigation with its capacity to generate power and with the sale of power as without, and provided, further, that the additional use is a public one, so that condemnation is not sought for a private use in part or in greater part, as was the case in *Fallsburg P. & Mfg. Co. v. Alexander,* 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, and *Minn. C. & P. Co. v. Koochiching Co.* 97 Minn. 429, 107 N. W. 405. The situation here is not unlike *Lower v. C., B. & Q. R. Co.* 59 Iowa, 563, 13 N. W. 718, which we may cite without wholly committing this court to the doctrine of that case. See, also, *Ten Broeck v. Sherrill,* 71 N. Y. 276, where the canal commissioners under a power of eminent domain appropriated gravel for the use of a contractor who was required by his contract to furnish this material.

4. What would have been the result had the appellants proved that the dam in question was not in aid of navigation at all, or had they proved that the dam was built higher than the facilities of navigation at any season or under any circumstances would require, and merely for the purpose of creating

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power, and that their lands would not have been flooded but for such excessive and unnecessary height, we need not here determine, because there is no such case before the court.

5. Even where the public use justified the erection of the dam, and the dam, in addition to subserving its public purpose, incidentally caused a surplus of water available for power and for private use, it was held that the public use was not thereby impaired or destroyed. *Green Bay & M. C. Co. v. Kaukauna W. P. Co.* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *Wis. River Imp. Co. v. Manson,* 43 Wis. 255.

In considering cases like this it is to be kept in mind that each of the corporations, *Wisconsin River Improvement Company* and the Tomahawk Power Company, are at all times answerable to the state for nonfeasance or misfeasance in their obligations to the public, and that as against the state no dam could be maintained under respondent's charter which was an impediment to navigation or which was only useful for generating power. The legislature might have conferred upon the Tomahawk Power Company, under its present duties and obligations with respect to the sale of power, the right of eminent domain; but it is not clearly shown that this corporation comes within ch. 277, Laws of 1907. The evidence fails to show that the dam is to be constructed or the land taken for any private use, and the additional public use of generating and distributing power cannot be held to make unlawful the condemnation proceedings in question, which appear by the findings and order of the superior court to be necessary steps in an improvement of the river in aid of navigation, and therefore *prima facie* within the charter powers of the *Wisconsin River Improvement Company.*

By the Court.—The order of the superior court is affirmed.

BARNES, J., took no part.

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CURTIS LAND & LOAN COMPANY, Respondent, vs. INTERIOR LAND COMPANY, Appellant.

December 1—December 15, 1908.

Vendor and purchaser: Contracts: Form: Letters: Specific performance: Breach by vendor: Breach by vendee: Remedies: Consideration: Proposals: Acceptance: Conditions: Title to be passed: Tax certificates: Rights and title of holder: Parol evidence: Admissibility to affect writings: Surveys: Evidence: Corporations: Officers and agents: Presumption as to authority: Estoppel.

1. It is the settled law of Wisconsin that a valid and binding contract for the sale of real estate may be made through the medium of letters.
2. In case of a breach of such a contract on the part of the vendor, the vendee may enforce specific performance, and, in the event of a breach on the part of the vendee, the vendor may maintain an action to recover the purchase price.
3. The promise to pay on the part of a vendee of lands is a sufficient consideration for the agreement to sell by the vendor.
4. In case of a contract to sell lands, evidenced by letters, the letters must contain all the elements necessary to constitute an unambiguous contract. Among other things there must be a definite offer to sell on the part of the owner of the land and an unqualified acceptance of such offer on the part of the purchaser.
5. In case of a contract to sell lands, evidenced by letters, the vendee in his letter of acceptance cannot attach any condition to his acceptance, even to the extent of undertaking to dictate the place where payment shall be made. If the attempted acceptance is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance but a counter proposition.
6. Where the letter of acceptance contains a mere suggestion or request that payment be made at a particular place, but such request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell and will not defeat an action for specific performance.
7. Defendant offered by letters to sell the SW SW 6-35-8, to which plaintiff replied, "We will take your SW SW 6-35-8, Lincoln county, Wisconsin." *Held*, that the ambiguity as to the location of the land contained in defendant's offer was made certain by plaintiff's letter, which attached no condition to his acceptance, there being no claim of any misunderstanding as to the lands intended.

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8. An agreement to sell land at a sound price, without reservation or exception, implies that a marketable title free of incumbrances will be passed to the vendee upon compliance with his obligations.
9. Under an agreement by a vendor of lands to execute a good and sufficient conveyance the purchaser may demand a clear title as well as that it be assured him by proper covenants.
10. The holder of a tax certificate, if in fact held adversely, has an equitable title to the lands.
11. A tax certificate imports, while outstanding, an absolute and paramount right, subject only to the right of redemption, and constitutes an incumbrance upon the land and a cloud upon the title.
12. A vendee of lands, without reservation as to title, has the right to insist that outstanding tax certificates be redeemed, and by so doing adds nothing to the obligation the vendor assumed when his offer was accepted.
13. A statement in a letter accepting an offer to sell lands: "If it is just as satisfactory to you, will you please send your deed to [a bank named] for collection," is a mere suggestion or request, and not an attempt to impose a condition not in consonance with the offer.
14. Under a written contract to convey the SW SW 6–35–8 in a certain county of this state at a specified price per acre, the unit upon which the price was made and accepted is the acre, and there is no such ambiguity in the writings as would admit parol testimony to vary the terms of the written agreement.
15. In the absence of proof to the contrary, the presumption exists that a government survey shows the correct acreage of a particular forty.
16. One who knows that the officer or agent of a corporation with whom he is dealing habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the corporate business, has a right to assume that such officer or agent is acting within the scope of his authority.
17. A corporation is estopped from denying that its agents possess all the authority which it gives them the appearance of having.
18. A corporation is estopped from denying that its general officer has the powers which it has customarily allowed him to exercise.
19. Where the secretary and treasurer of a corporation is clothed with apparent authority to do acts which he does, his acts are binding on the corporation.

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APPEAL from a judgment of the superior court of Lincoln county: ALMON A. HELMS, Judge. *Affirmed.*

This action is brought to compel the defendant to specifically perform a contract alleged to have been made for the sale of real estate. The contract is based entirely upon letters passing between the parties. On December 10, 1906, the plaintiff wrote the defendant as follows:

"Will you please let us know your cash price per acre for SW SW 6–35–8."

Two days later the defendant answered, acknowledging receipt of this letter, and stating:

"Will say our cash price on SW SW 6–35–8 is $6 per acre. Would be pleased to sell same to you."

On December 17th plaintiff, replying to this letter, wrote as follows:

"Your favor of the 12th inst. received. We will take your SW SW 6–35–8, Lincoln county, Wisconsin, for your cash price of $6 per acre. Your records probably show the acreage, which is 22.13 acres. If it is just as satisfactory to you, will you please send your deed to National Bank of Merrill for collection. Kindly have it made out to *Curtis Land & Loan Co.,* a Wisconsin corporation. We note that this description was sold in 1903 and 1904 to F. J. Smith for delinquent taxes. Please take care of these taxes. We may later be able to do some business with you respecting your other descriptions in the section named, and are not ready to consider them just now."

On December 19th the defendant acknowledged receipt of this letter as follows:

"Your letter of the 17th at hand and noted. Will say that our records do not show that this is a fractional forty, and we would have to investigate this further, but we could sell it to you, as we understand that this is a full forty. With reference to this description being sold for taxes to F. J. Smith, or in the name of F. J. Smith, are tax certificates we had him buy in for us. We will look this matter up

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promptly and let you know just as soon as we can have it looked up. We do not anticipate selling this forty for less than $240, which was at the rate of $6 per acre for the full forty. We will investigate and let you hear from us promptly."

The remaining portion of the correspondence consisted largely of claims made by the plaintiff that the foregoing letters constituted a complete contract, and of denials of such claims on the part of the defendant.

The trial judge decided that a valid contract was entered into between the parties and that the plaintiff was entitled to a decree for specific performance, and judgment was entered accordingly, from which judgment the defendant brings this appeal.

In addition to contending upon the trial that the letters did not constitute a valid contract, the defendant likewise asserted that such letters were written by a representative of the defendant who had no authority to quote prices on the parcel of land in question, and that the defendant corporation was not bound by the acts of its agent in so doing.

For the appellant there was a brief by *Jeffris, Mouat, Smith & Avery,* and oral argument by *L. A. Avery.*

For the respondent there was a brief by *Smart & Curtis,* and oral argument by *E. M. Smart.*

BARNES, J. The appellant urges that the judgment appealed from is erroneous in the following particulars: (1) The court had no jurisdiction of the subject matter of the action. (2) The contract is executory and is without consideration, and equity will not enforce specific performance of such a contract. (3) The letters passing between the parties did not make a contract. (4) No competent evidence was offered to show the acreage of the parcel of land in controversy. (5) The agent and officer of the defendant corporation who carried on the correspondence in its behalf had

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no authority to bind his principal. (6) The alleged contract was void under sec. 2304, Stats. (1898).

The first, second, third, and sixth errors assigned are so correlated that they may well be treated together. No claim is urged upon our consideration to the effect that the superior court of Lincoln county had not jurisdiction concurrent with that of the circuit court of such county to try actions brought to compel specific performance. The first error assigned is in fact predicated upon the proposition that no contract was entered into between the parties, and, in any event, if the writings are held to constitute a contract, the plaintiff's appropriate remedy is an action at law to recover damages for the breach of such contract. The second, third, and sixth alleged errors relate solely to the legal effect that should be given the letters passing between the parties and constituting the alleged contract.

It is the settled law of this state that a valid and binding contract for the sale of real estate may be made through the medium of letters. It is just as well settled that, in case of a breach of such contract on the part of the vendor, the vendee may enforce specific performance, and that, in the event of a breach on the part of the vendee, the vendor may maintain an action to recover the purchase price. The promise to pay on the part of the vendee is a sufficient consideration for the agreement to sell by the vendor. *N. W. Iron Co. v. Meade,* 21 Wis. 474; *Clark v. Burr,* 85 Wis. 649, 55 N. W. 401; *Baker v. Holt,* 56 Wis. 100, 14 N. W. 8; *Matteson v. Scofield,* 27 Wis. 671; *Kreutzer v. Lynch,* 122 Wis. 474, 100 N. W. 887; *W. G. Taylor Co. v. Bannerman,* 120 Wis. 189, 97 N. W. 918. The cases cited hold that such letters must contain all the elements necessary to constitute an unambiguous contract, and that there must be contained therein a definite offer to sell on the part of the owner of the land and an unqualified acceptance of such offer on the part of the purchaser. The vendee in his letter of acceptance may not at-

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tach any condition to such acceptance, even to the extent of undertaking to dictate the place where payment shall be made. If his attempted acceptance is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance, but is in reality a counter proposition. *N. W. Iron Co. v. Meade, supra; Baker v. Holt, supra.* Where the letter of acceptance contains a mere suggestion or request that payment be made at a particular place, but such request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat an action for specific performance. *Matteson v. Scofield,* 27 Wis. 671; *Kreutzer v. Lynch,* 122 Wis. 474, 100 N. W. 887. Applying these principles of law to the errors under consideration, the case does not present any unusual difficulties.

The letter of defendant written December 12, 1906, was ambiguous as to the parcel of land which was the subject thereof, although both parties undoubtedly understood it to refer to the southwest quarter of the southwest quarter of section 6, township 35 north, of range 8 east, in Lincoln county. The ambiguity consisted in the correspondence up to this point not showing the state in which the land was located, or whether the township was north or south or the range east or west. Plaintiff's letter of acceptance referred to the land as being located in Lincoln county, Wisconsin, and with this addition to the description referred to in the former correspondence there was no ambiguity about it whatever. This was the letter that resulted in the final consummation of the agreement. In addition to accepting defendant's offer it cleared up something that the parties had in mind by making it a part of the writings. The defendant made no protest against the declaration that the land was located in Lincoln county, and does not now make any claim that both parties did not perfectly comprehend and understand that they were dealing with land correctly described in

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the letter last referred to. The addition of the words "Lincoln county, Wisconsin," to the description in plaintiff's letter of acceptance attached no condition to the acceptance of the offer to sell, but elucidated something that was perfectly apparent to the contracting parties, and clarified the situation by obviating the objection that the writings were not sufficiently definite as to description.

Plaintiff's letter of acceptance also contained the following statement: "We note that this description was sold in 1903 and 1904 to F. J. Smith for delinquent taxes. Please take care of these taxes." This letter makes it clear that the plaintiff expected the defendant to take care of the outstanding tax certificates mentioned in the letter. If this portion of the letter contained any requirement that was not comprehended in the defendant's offer to sell, then it may well be asseverated that plaintiff did not make an unqualified acceptance, but a conditional one, and that therefore no contract was made. If the legal effect of defendant's offer to sell the land at a stated price was that it should furnish a marketable title free and clear of outstanding liens and incumbrances, then the paragraph quoted added nothing to the defendant's proposition to sell and did not constitute a counter proposition. The defendant's offer to sell is silent as to the nature of its title and as to the character of the conveyance which it purposed giving. But the law seems to be well settled that an agreement in general terms to convey real estate, without specifying the nature of the title held by the vendor or the kind of a deed which is to be given, calls for a conveyance of the entire interest in the land sold, by a good and sufficient deed. In other words, an agreement to sell at a sound price, without reservation or exception, implies that a marketable title free of incumbrances will be passed to the vendee upon compliance with his obligations. *Young v. Wright,* 4 Wis. 144; *Wright v. Young,* 6 Wis. 127; *Bateman v. Johnson,* 10 Wis. 1, 3; *Arentsen v. Moreland,* 122 Wis. 167, 175, 99 N.

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W. 790. On an agreement by the vendor of lands to execute a good and sufficient conveyance the purchaser may demand a clear title as well as that it be assured him by proper covenants. *Davis v. Henderson,* 17 Wis. 105, 107; *Taft v. Kessel,* 16 Wis. 273, 277. The decisions outside of this court are generally to the effect that an agreement to convey, in the absence of any reservation or exception therein, requires the vendor to convey a marketable title free of incumbrances. *Drake v. Barton,* 18 Minn. 462 (Gil. 414); *Dwight v. Cutler,* 3 Mich. 566; *Sibley v. Spring,* 12 Me. 460; *Hill v. Hobart,* 16 Me. 164; *Shreck v. Pierce,* 3 Iowa, 350; *Bartle v. Curtis,* 68 Iowa, 202, 26 N. W. 73; *McGuire Bros. v. Blanchard,* 107 Iowa, 490, 78 N. W. 231; *Swan v. Drury,* 22 Pick. 485; *Van Eps v. Schenectady,* 12 Johns. 436, 442; *Dearth v. Williamson,* 2 Serg. & R. 498; *Swayne v. Lyon,* 67 Pa. St. 436.

The tax certificates referred to in the plaintiff's letter of December 17th were outstanding liens against the land. One of the certificates was subject to a tax deed and the other would be subject to deed within a few months. The holder of these certificates, if they were in fact held adversely to the defendant, had an equitable title to the land. *Eaton v. Manitowoc Co.* 44 Wis. 489. They imported, if outstanding, an absolute and paramount right, subject only to the right of redemption. *Coe v. Manseau,* 62 Wis. 81, 22 N. W. 155. They constituted an incumbrance upon the land (*Pillsbury v. Mitchell,* 5 Wis. 17) and a cloud upon the title (*Dean v. Madison,* 9 Wis. 402). It is apparent that the defendant would not be complying with the terms of its offer to sell in the event of its refusal to take care of these outstanding tax liens, and that therefore the plaintiff might insist in its letter of acceptance that the certificates in question, if outstanding, be redeemed, and that by so doing it added nothing to the obligations the defendant had assumed in the event of its offer being accepted.

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Aside from the considerations referred to, defendant's offer to sell was without qualification and the plaintiff's acceptance was without condition. The statement in plaintiff's letter, "If it is just as satisfactory to you, will you please send your deed to National Bank of Merrill for collection," was a mere suggestion or request, and not an attempt to impose a condition upon the defendant not in consonance with its offer. It is apparent that there was no intention on the part of the plaintiff to make its acceptance conditional upon the deed being sent to Merrill for collection.

The plaintiff contended that the actual acreage of the description involved and the quantum of land for which it should pay was 22.13 acres. The defendant asserted that it was entitled to pay for forty acres, and, inasmuch as it supposed it was selling forty acres, whereas the plaintiff supposed it was buying a lesser quantity, the minds of the parties never met on the consideration to be paid. There does not seem to be any ambiguity in the contract in this regard. Certainly an acre of land ordinarily means 160 square rods. There is no claim made in this case that the government survey did not accurately show the actual acreage of the parcel of land in question. It is notorious that there are variances in the actual acreage of quarter-quarter sections in government surveys, not often as great as is found here, but still very considerable. A patent conveying the ordinary quarter-quarter section of land generally recites that it contains forty acres more or less according to the government survey. It seldom happens that a description having a range line for its western boundary, as in the case before us, or one having a township line for its northern boundary, contains just forty acres. The variances in such cases are often wide. Sometimes the acreage largely overruns, sometimes it falls short. If the description in question contained fifty or sixty acres, as many descriptions lying immediately east of range lines do, we entertain no doubt that plaintiff would, upon accept-

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ance of defendant's offer, be compelled to pay upon the actual acreage. The unit referred to in the correspondence of both parties, and upon which a price was made and accepted, was the acre, not the forty, and there does not appear to be any such ambiguity in the writings as would admit of any parol testimony to vary the terms of the written agreement. In defendant's letter written in reply to plaintiff's letter of acceptance it does not place any different construction upon the contract. It said that "our records do not show that this is a fractional forty, and we would have to investigate this further, but we could sell it to you, as we understand that this is a full forty." This is not an assertion on defendant's part that its offer, in reality, was one to sell the description for $240. Its statement amounted to little more than saying that, because its records did not show the forty to be fractional, it would have to satisfy itself as to what the acreage was before making a conveyance.

It is urged that the proof is insufficient to sustain the findings of the court that the acreage of the description of land in question was only 22.13. An examination of the testimony discloses that there was sufficient evidence to sustain a finding to the effect that the government survey showed the acreage to be in accordance with the finding of the court. In the absence of proof to the contrary, the presumption would be that the correct acreage was shown by such survey.

The remaining error relates to the authority of F. J. Jeffris, who carried on the correspondence for the defendant, to bind it. There were three stockholders in the defendant corporation: D. K. Jeffris, D. H. Jeffris, his wife, and F. J. Jeffris, each of whom was a director. D. K. Jeffris was president, D. H. Jeffris vice-president, and F. J. Jeffris secretary and treasurer. F. J. Jeffris carried on the correspondence in behalf of the defendant with the plaintiff, and it is asserted that he did not have the authority to bind the defendant by his offer to sell, no such authority having been

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conferred, at least by any formal action taken by the board of directors of the corporation. In reference to the subject of authority, F. J. Jeffris testified that he and D. K. Jeffris handled the business of the corporation; that he generally did the work and his brother did the rest; that he kept the books, answered letters, signed the name of the company, and closed deals for the sale of lands, subject to the approval of his brother; that, if a proposition came to the office to buy a parcel of land for a stated price, he generally answered it, accepting or refusing the offer without consulting any one; that his brother knew that he answered such letters without consultation, and knew that the witness was carrying on the business of the defendant in this way at the time the correspondence referred to took place; that he consulted his brother as occasion required; that the wife of D. K. Jeffris left the business to the witness and her husband; that the company did not call directors' meetings when it desired to sell lands; that his practice was not to consult his brother before making such an offer to sell as was contained in his letter to the plaintiff; and that his brother left to him the matter of making quotations, and in making quotations or offers he signed the name of the company and placed his initials thereunder. The court found on sufficient evidence that the managing agent of the plaintiff, who conducted the negotiations on its behalf, knew F. J. Jeffris and knew the position which he occupied in the *Interior Land Company,* and knew that he acted generally for the defendant in fixing prices and in dealing with its lands.

A very large part of the business of the country is carried on by corporations. It certainly is not the practice of persons dealing with officers or agents who assume to act for such entities to insist on being shown the resolution of the board of directors authorizing the particular officer or agent to transact the particular business which he assumes to conduct. A person who knows that the officer or agent of the corpora-

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tion habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the conduct of the corporate business assumes, as he has the right to assume, that such agent or officer is acting within the scope of his authority. It has recently been said by this court that the secretary of the ordinary business corporation is just as much its general managing agent as is the president, both performing interchangeably a wide range of duties, and exercising much the same functions in the conduct of corporate business as are exercised by general partners in a copartnership business. *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 117 N. W. 1020. A corporation is estopped from denying that its agents possess all the authority which it gives them the appearance of having. It is estopped from denying that a general officer had the power which it has customarily allowed him to exercise. This subject is so fully discussed in the case of *St. Clair v. Rutledge,* 115 Wis. 583, 92 N. W. 234, and in the cases therein referred to, that no good purpose would be served in reiterating a doctrine which is well established and which we think is fairly applicable to the facts before the court in this case. The secretary and treasurer of the defendant was clothed with apparent authority to do the acts which he did do, and his acts are binding upon the corporation.

By the Court.—Judgment affirmed.

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HOFFMAN, Respondent, vs. LINCOLN COUNTY, Appellant.

December 1—December 15, 1908.

County judges: Compensation: Appeal and error: Questions presented for review: Conclusiveness of findings: Officers: Per diem *compensation: Splitting days: Judicial day's work: Statutes.*

1. Under sec. 694, Stats. (1898), providing that the county board shall fix the salaries of county officers, including the county judge, in the absence of other specific provisions the salary of a county judge so fixed constitutes the sole compensation for all services which the law requires of him.

uder sec. 2454, Stats. (1898), as amended by ch. 45, Laws of 1903, judges of county courts which do not have civil jurisdiction are entitled to a *per diem* compensation for hearing applications for permits allowing minors to labor, except in counties where provision is otherwise made by law.

3. The county court of Lincoln county is endowed with civil jurisdiction by ch. 249, Laws of 1895, and sec. 9 thereof provides that, in all matters, actions, and proceedings of which the county court and the judge thereof "had jurisdiction before the passage of this act," it should be lawful for him to receive and charge the same fees and *per diem* as theretofore allowed by law for like services, to be paid in like manner. Ch. 109, Laws of 1891, in force in 1895, prohibiting the employment of children under fourteen years of age in certain occupations, except upon a permit to be obtained from the county judge after examination into the circumstances, further provided that "no charge or fee shall be *required* under this section." *Held:*

(1) The word "required" indicates that the intent was to make sure that the application should be entirely free to the applicant and to prevent the county judge from requiring such applicant to pay anything in order to secure the permit.

(2) The county judge of Lincoln county was entitled to his *per diem* compensation from the county for time actually engaged in considering applications for child labor permits at the time of the passage of the act giving his court civil jurisdiction.

(3) The county judge of Lincoln county was entitled to a *per diem* compensation for his services in examining and passing upon applications for such permits in 1906.

4. A finding is conclusive on appeal where there is no exception thereto and the evidence is not preserved by bill of exceptions.

5. While, as a general rule, under statutes allowing a *per diem*

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compensation to officers for services, a day cannot be split up, and the officer is entitled to a full day's pay if any time was occupied in the service, although the whole day is not consumed, the use of the words "for each day he shall be actually engaged" in the matter, is *held* indicative of an intention only to allow for time actually consumed.

6. Such construction necessitates a splitting up of days and a charge by the hour, and in the instant case, in the absence of any error assigned or argued upon the decision of the lower court that six hours constituted a day's work for a county judge, such decision is affirmed, without committing this court in any way upon the question as to the proper length of a judicial day.
7. Where a statutory charge for an officer is limited to $5 per day it means a calendar day, and, where the number of hours constituting a day is fixed, such officer cannot, by working over hours, entitle himself to more than the *per diem* allowance for any one calendar day.

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Modified and affirmed.*

Ralph E. Smith, for the appellant.

For the respondent there was a brief by *Smart & Curtis,* and oral argument by *M. G. Hoffman.*

WINSLOW, C. J. The plaintiff, who is the county judge of *Lincoln* county, filed with the county clerk an itemized claim against the county, in which, among other items, he claimed payment at the rate of $5 per day for time spent by him, from November, 1905, to November, 1906, in hearing and deciding applications for permits allowing minors under sixteen years of age to labor, under the provisions of the child labor laws of the state. The county board having disallowed these items, the plaintiff appealed to the circuit court, which court allowed the claim as presented, and the county appeals.

The questions here presented are purely questions of statutory construction. Sec. 694, Stats. (1898), provides that the county board shall fix the salaries of county officers, includ-

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ing the county judge. In the absence of other specific provisions the salary so fixed would doubtless constitute his sole compensation for all services which the law requires of him. Sec. 2454, Stats. (1898), as amended by ch. 45, Laws of 1903, however, contains other provisions which bear upon the question. This section prohibits a county judge from charging or receiving any fees for services in probate proceedings and certain other cognate matters, except in counties where it is otherwise provided by law, but also provides that the judge of any court *not vested with civil jurisdiction* shall be entitled to receive $5 per day from the county treasury for each day *actually engaged* in criminal examinations or in other matter, not appertaining to probate business, compensation for which is not otherwise provided. This law, with certain differences not material here, has been in force since 1880. 2 S. & B. Ann. Stats. secs. 2454, 2454*b*. The hearing of applications for permits allowing minors to labor is certainly a matter not appertaining to probate business, and, as the child labor law provides no compensation for such service, it seems that judges of county courts which do not have civil jurisdiction are entitled to a *per diem* compensation under this section, except in counties where provision is otherwise made by law. The county court of Lincoln county was, however, endowed with civil jurisdiction by ch. 249, Laws of 1895, and thus no *per diem* compensation can be allowed to its judge unless his right thereto be saved by some special provision. Sec. 9 of the last-named chapter, after giving the county judge the same fees as justices of the peace in actions and proceedings brought before him under the law, provides that, in all matters, actions, and proceedings of which the county court and the judge thereof "had jurisdiction before the passage of this act," it should be lawful for him to receive and charge the same fees and *per diem* as theretofore allowed by law for like services, to be paid in like manner.

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The question, therefore, is whether such proceedings are proceedings of which the county judge had jurisdiction, and for which he was entitled to receive compensation from the county, prior to the passage of the act giving the court civil jurisdiction. This inquiry involves some examination of the child labor statutes. The law in force in 1895 was ch. 109, Laws of 1891, which prohibited the employment of children under fourteen years of age in certain occupations, except upon a permit to be obtained from the county judge after examination into the circumstances, and further provided that "no charge or fee shall be required under this section." So it appears that the county judge had jurisdiction of a proceeding of this nature at the time of the passage of the act of 1895; but it is claimed that the provision that no charge or fee should be required by him prevented his recovery of a *per diem* compensation from the county. We do not give the words that construction, however, nor do we think that they were intended for that purpose. The word "required" is quite significant, and we think quite clearly indicates that the intent was to make sure that the application should be entirely free to the applicants and to prevent the county judge from requiring such applicant to pay anything in order to secure the permit. If this view be correct, it follows that the county judge was entitled to his *per diem* compensation from the county for time actually engaged in considering applications for child labor permits at the time of the passage of the act giving his court civil jurisdiction.

It is true that there have been considerable changes made in the child labor laws, and they have been amplified so as to include other occupations and cover children under sixteen years of age, by ch. 274, Laws of 1899, ch. 182, Laws of 1901, and ch. 349, Laws of 1903, and it is also true that a number of other officers may now grant permits; but, after all, the proceeding before the county judge has remained substantially the same proceeding that it was in 1895, namely,

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a proceeding to determine whether in the judgment of the county judge a minor under a certain age should be permitted to labor for others, and, if so, under what restrictions and conditions. From this conclusion it follows that the plaintiff was entitled to be allowed a *per diem* compensation for his services in examining and passing upon applications for such permits

In making up his account the plaintiff made it on the basis that six hours constituted a day's work, and then proceeded to charge for his time spent in hearing each application at the rate of eighty-three cents an hour for the time actually occupied. In most cases the charge was for a single hour, but in some cases it was for an hour and a half. The court found that the plaintiff actually consumed the amounts of time stated in his bill in performing the services charged for, and there is no exception to the finding, nor is the evidence preserved by bill of exceptions; hence the finding is conclusive. While no attack was made by appellant upon this method of splitting up a day and making charges by the hour upon the basis of a day of six hours, our attention has been directed to the matter, and it seems that the question of the correctness of this method may properly be considered.

It has sometimes been held that, under statutes allowing a *per diem* compensation to officers for certain services, a day could not be split up, and that the officer was entitled to a full day's pay if any time was occupied in the service, although the whole day was not consumed. *Smith v. Jefferson Co.* 10 Colo. 17, 13 Pac. 917. We are not inclined, however, to give this construction to the law before us. The words "for each day he shall be *actually engaged*" in the matter seem to us clearly indicative of the intention only to allow for the time actually consumed. This construction necessitates a splitting up of days and a charge by the hour, and a charge by the hour necessitates the establishment of some arbitrary number of hours as a day's work. In this case six

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hours was considered a day's work, and no contention is made that a longer time should have been fixed. In the absence of any error assigned or argued upon the point, we do not feel required to consider or determine the question of the proper length of the judicial day, and this decision is not to be considered as committing the court in any way upon the question. No objection being made by the defendant, we simply pass the question. It appears, however, that on May 31st he charged $6.23 for seven and one-half hours' work, and on June 1st $11.22 for thirteen and one-half hours. These charges cannot be approved. The statutory charge is limited to $5 per day, and this means a calendar day. He could not, by working over hours, entitle himself to more than the *per diem* allowance for any one calendar day. *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. These items, therefore, must each be reduced to the sum of $5. This results in a reduction of the claim in the sum of $7.45.

By the Court.—The judgment is modified by deducting therefrom $7.45, and as so modified is affirmed, with costs to respondent.

KOPCYZNSKI, Plaintiff in error, vs. THE STATE, Defendant in error.

December 1—December 15, 1908.

Criminal law and practice: Arson: Nature of offense: Dwellings: Persons liable: Husband and wife: Indictment and information: Allegations of ownership: Status of title to property: Materiality.

1. The offense of burning the dwelling house of another, covered by sec. 4399, Stats. (1898), is the same as that of such burning by common law.
2. The offense of burning the dwelling house of another relates to the security of the habitation, not to that of property.
3. In case of the felonious burning of the dwelling house of another, the idea is that the house of such other is his to occupy as a habitation, regardless of the title to the property. One may be guilty by burning his own house, when it is the dwelling house

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of another, but cannot if it is his own habitation. So neither husband nor wife can be guilty of such offense by burning the dwelling house which they jointly occupy as a home, regardless of the status of the title.

4. In charging the offense of burning the dwelling house of another, it is proper to allege the dwelling house to be that of him who occupies the structure as a habitation, though he may have no property right therein.

5. The rule that a husband or wife cannot be, under any circumstances, properly charged with the offense of burning the dwelling house which the two jointly occupy as their habitation, does not apply where it is the habitation of but one; the other, though the marital relations still exist, having left the same to reside elsewhere.

6. In the case last suggested, the status of the title to the property is immaterial, except as it may bear on the question of fact respecting joint occupancy of the property burned as a dwelling house.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

Plaintiff in error was charged under sec. 4399, Stats. (1898), with burning the dwelling house of Julia Kopcyznski, November 6, 1905, no person being lawfully therein. The cause was tried on a plea of not guilty. There was evidence to this effect: The accused at the time of the occurrence was the lawful husband of Julia Kopcyznski. They had lived on the farm on which the house was located for some twenty years before they separated as hereafter stated. Some time in 1904 the accused deeded the farm to his wife, she then giving him $500, which he claimed had been previously given to her by him for safe-keeping, but which she claimed was her money. Prior to the time the farm was so deeded the parties had serious trouble. After the settlement, including the deeding of the farm and payment of the money, it was understood the accused could stay on the place so long as he behaved himself. About a year thereafter trouble commenced again and became quite serious. He was a mason and accustomed to be away from home working at his trade a considerable portion of his time. Shortly before the

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fire the parties had trouble. She commenced an action for divorce and he left home, taking substantially all his personal belongings with him. He was not then working at his trade. He returned November 2d, apparently for the purpose, only, of making some settlement with his wife. He remained in the house over night, Mrs. Kopcyznski sharing her bed with him, by compulsion as she claimed, but otherwise as he claimed. He left the next morning, but soon returned, when she, becoming frightened because of his conduct, went away. November 3d he was arrested upon the complaint of his wife for assault. He did not stay at the house thereafter. On the night of the 5th and 6th the house was burned, and there was evidence tending to show that he set the fire. The jury rendered a verdict of guilty.

For the plaintiff in error there was a brief by *Brown, Pradt, Genrich & Anderson,* and oral argument by *F. W. Genrich.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

MARSHALL, J. It is conceded, as the fact is, that—unless suggestions hereafter mentioned should be approved, giving to the words of the written law a different signification than the same words have commonly—the offense with which the accused was charged is the same as the common-law offense of felonious burning of the dwelling house of another, which relates to the security of the habitation of the person characterized as "another" regardless of the location of the title to the property. The idea is that the structure burned, in any given case, is the property of the person named, as owner to occupy as a dwelling house. 2 Bishop, New Crim. Law, § 12. So it has been commonly held that one cannot, without some written law to the contrary, be guilty of arson by burning his own dwelling house. Neither can the wife or husband, because of their legal identity and common occupancy

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of the home, be guilty of arson by burning their habitation, regardless of the one in whom the title rests. McClain, Crim. Law, § 521. So it has been supposed to be sufficient, in prosecuting for the serious violation of the home of burning it under circumstances satisfying the essentials of arson, to charge, as regards the property destroyed, that it is the dwelling house of the one who happens to be in possession thereof as a home, and, generally speaking, though the title be in the person who sets the fire, the structure not being his dwelling place. *State v. Fish,* 27 N. J. Law, 323; *Sullivan v. State,* 5 Stew. & P. 175; *Young v. Comm.* 12 Bush, 243; *People v. Wooley,* 44 Cal. 494; *Burger v. State,* 34 Neb. 397, 51 N. W. 1027; *May v. State,* 85 Ala. 14, 5 South. 14; *Avant v. State,* 71 Miss. 78, 13 South. 881. So a person may be charged with being guilty of arson by burning his own house, if it is at the time of the occurrence the home of his tenant instead of himself. Many illustrations might be given, but there is no need thereof.

The assistant attorney general contends that the common-law rule, stated, has been changed by the written law; that the general spirit of our statutes on the subject of felonious burning and other subjects indicates that the legislative purpose was to change the nature of the particular offense to one distinctively against property, instead of against the security of the home. Attention is called to the fact that such offense is classified in the statutes, as it has been from the first, with other burnings of buildings, and criminal violations of property rights, under the head of "Offenses Against Property," and that it is expressly provided now that a lessee or tenant of a dwelling house, who violates his own home by feloniously burning it, is guilty of burning the dwelling house of another. The argument is not without merit, though it is the opinion of the court that the particular invasion of the common-law rule, while retaining the set phrase, "dwelling house of another," indicates a legislative intention to retain the common-law features of arson, except as thus changed.

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Counsel for the accused combat the idea that, in general, the nature of the act of felonious burning of the dwelling house of another has been changed by the written law, by pointing to the statute of the state of Michigan, which antedates ours and is substantially the same, word for word, and by which, from the beginning, the particular offense was also classified with offenses against property, and also refers to *Snyder v. People,* 26 Mich. 106, construing such statute and holding the offense to be the same as at common law and that, in harmony therewith, "a husband, living with his wife, and having a rightful possession, lawfully with her, of a dwelling house which she owns and they both occupy," is not capable of committing the crime of arson by burning it. The reasoning in such case seems logical and the result reached sound.

The foregoing conclusion by no means is controlling in favor of the accused on the facts of this case. The basis for the rule, carefully stated by the Michigan court, and by it carefully fenced about, is now absent. In saying this we assume the fact to be, as found by the jury—and upon sufficient evidence, in our opinion, to prevent such finding from now being rightfully disturbed,—that the accused was not living with Mrs. Kopcyznski at the time of the wrongful act; that they were not jointly occupying the home, but that it was occupied solely by her as her habitation and that of her son. As the assistant attorney general suggests, the Michigan court repudiated any intention of holding that under such circumstances the offense would not be arson. It is the opinion of the court that such is the offense. There is no judicial authority to the contrary brought to our attention or which we have been able to discover, nor any reason harmonizing with the logic of the common-law rule as applied to the concurrence of facts to which only it relates.

The result is, in the opinion of the court, a married man can commit the crime of arson by burning the home of his wife with whom he is not living and from which he has been

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excluded, or excluded himself, and the question of in whom the title to the property rests, at least unless expressly alleged, is immaterial except as evidentiary, with other circumstances, bearing on the question of dwelling together under the same roof or not, at the time of the wrongful act.

By the Court.—Judgment is affirmed.

POOLE, Respondent, vs. TANNIS, Appellant.

October 24—December 18, 1908.

Contracts: Specific performance: Vendor and purchaser: Lien: Disposition of cause on appeal: Correction of judgment of appellate court.

1. Specific performance of an oral agreement for a mortgage cannot be enforced where there is failure to specify any time when the mortgage was to mature and be payable.
2. In an action to enforce specific performance of an alleged oral agreement for a mortgage to secure moneys advanced by plaintiff to defendant, where there could be no such relief granted because the evidence failed to establish a sufficiently certain and definite contract to mortgage, the claim sought to be enforced not arising out of a transaction between vendor and vendee and the facts clearly negativing such a relationship, it is error to award plaintiff a vendor's lien.
3. In such case under the evidence, stated in the opinion, it is *held* that plaintiff is entitled to a judgment giving her an equitable lien on the premises in question and ordering a sale thereof if the defendant failed to satisfy such judgment by payment of the amount due with costs.
4. Where on appeal the judgment of the lower court was held erroneous because it awarded a vendor's lien instead of an equitable lien, and it was the intention of the appellate court to affirm the judgment because there was no material difference in the legal consequences of the two liens and hence the error was not prejudicial, but by inadvertence a mandate of reversal was entered, the appellate court, of its own motion, corrects the mandate and directs entry of judgment of affirmance.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

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Plaintiff alleged that she advanced $900 to the defendant, her son, to be used in purchasing a lot and in erecting a homestead, with the understanding that she was to receive a four per cent. mortgage therefor; that the money was expended, $300 in the purchase and $600 with other moneys in the erection of a house; and that defendant refuses to execute the mortgage. She prayed specific performance and other general relief. The defendant contended that the money had been given to him upon his promise to pay four per cent. therefor annually, and to furnish a home for his mother so long as she chose to remain with him. Upon the trial the finding was substantially in accord with plaintiff's claims, but the court found that the terms of the mortgage were not defined by the agreement. In lieu of decreeing specific performance of the alleged agreement the court adjudged that plaintiff had a lien upon the premises for $900 and interest at four per cent., and that unless the same should be repaid to her within three months after the judgment the premises should be sold to realize her claim. This is an appeal from this judgment.

For the appellant there was a brief by *Tullar & Lockney,* and oral argument by *H. C. Lockney.*

For the respondent there was a brief by *Frame & Blackstone,* and oral argument by *H. J. Frame.*

The following opinion was filed November 10, 1908:

SIEBECKER, J. The court's findings upon the conflicting evidence of the parties cannot be disturbed as being against the preponderance of the testimony. The evidence presented fully sustains the court's findings, to the effect that there was an agreement that plaintiff should advance the money to defendant and that he was to use it to purchase a lot and in the construction of a house thereon, and that the repayment of the sum advanced should be secured by the house and lot. It is established that no part of the sum so advanced to defend-

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ant has been repaid, and that a sufficient demand for payment has been made and that payment has been refused. While plaintiff by her complaint demanded the specific enforcement of an oral agreement for a mortgage on the premises to secure this advancement, it is apparent that the evidence did not establish such an agreement because of the failure of the parties to specify any time when the mortgage was to mature and be payable. This state of the facts failed to establish a sufficiently certain and definite contract to mortgage the premises, and hence the court could not decree specific performance of it. *Buck v. Pond,* 126 Wis. 382, 105 N. W. 909. In the opinion of the trial court the allegations of the complaint and the facts proven to support them entitled plaintiff to recover in this action upon the ground that the plaintiff under the agreement made by the parties was to have a lien on the premises for the sum advanced defendant for the purchase of the lot and the building of the house, and the lien so agreed upon constituted a purchase-money lien. The court awarded judgment to that effect. There is no contention in this case that the claim sought to be enforced arises out of a transaction between vendor and vendee and the facts clearly negative such a relationship. Hence the judgment of the trial court awarding plaintiff a vendor's lien is not well founded. *Bartle v. Bartle,* 132 Wis. 392, 112 N. W. 471.

However, the question arises whether the plaintiff under the established facts is not entitled to the relief of an enforcement of an equitable lien upon the premises for the sums she contributed to the purchase of the lot and the building of the house thereon, in view of the fact that she relied on the agreement that the property should stand as security for the money she advanced to defendant to purchase and improve the lot, and defendant's refusal, after full performance of the agreement by plaintiff, to so secure the money advanced. It is shown that the money was advanced by the mother to the

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son upon the understanding that its repayment should be secured by a lien upon the premises, though the agreement established was not sufficiently clear and definite to provide for a mortgage security which she prayed should be specifically enforced. It is also plain that the son, through this arrangement and the confidential relationship between himself and his mother, obtained the money from her to acquire this property and that he now refuses to carry out the agreement. The mother having advanced the money on the faith of the son's promise and the defendant having used it for the acquisition of the property gives a basis for the interposition of equity to secure her a lien on the property and to enforce repayment out of it of the sum so advanced by her. *Osgood v. Osgood,* 78 Mich. 290, 44 N. W. 325; *Hughes v. Mullaney,* 92 Minn. 485, 100 N. W. 217; *Leary v. Corvin,* 181 N. Y. 222, 73 N. E. 984.

Plaintiff is entitled to judgment giving her a lien on the property and ordering a sale of the premises if the defendant fails to satisfy the judgment by payment of the amount due her, with costs.

By the Court.—Judgment reversed, and the cause remanded with directions to award judgment upon the findings in accord with this opinion.

The following opinion was filed December 18, 1908:

PER CURIAM. It was not intended in this case to reverse the judgment of the trial court, but simply to point out that the plaintiff's lien was not a purchase-money lien, as denominated by the trial court, but an equitable lien arising from the agreement under which the money was advanced. The intention of the court, after pointing out this distinction, was to affirm the judgment, because, in the situation of the present case, there was no material difference in the legal consequences of the two liens, and hence no prejudicial error. By

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inadvertence, however, a mandate of reversal, instead of affirmance, was entered, and the court now, of its own motion, corrects the error and directs the entry of the judgment which was intended.

By the Court.—The former judgment of this court herein is in all things vacated and set aside and the judgment of the trial court is affirmed.

HARING, Administrator, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

October 20, 1908—January 5, 1909.

Railroads: Negligence: Injuries to servants: Defective appliances: Contributory negligence: Failure to warn: Statutes: Questions for jury: Sufficiency of evidence.

1. In an action for negligent injury causing death of a servant by being crushed between a moving freight car and a railroad platform it appeared, among other things, that the platform, conforming to the curve of the track, was about twenty inches from the ends of a car as it passed, while the center of the car was about five and one-half inches from it; that the platform was so located that it provided only sufficient space between moving freight cars and the edge of the platform to prevent contact between them; that it was not designed to provide a working space at this point; that it was built according to the common method of building such freight platforms; and that the use of the platform for the purpose of loading and unloading freight was best served by locating it so as to have as small a space as possible between it and the cars on the adjacent track. Nothing was shown calling for a different construction of the platform for properly conducting such part of the railroad business, and it was not shown that defendant was negligent in so constructing the platform. *Held:*

(1) The construction of the platform in such manner that the position of a car on the curve left an open space between the ends of the car and the edge of the platform, which nat-

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urally might invite employees to occupy such space and lead them to believe they were in a safe place, did not render the appliance defective and unsafe.

(2) The fact that the ends of the car in passing over the curve would be farther away from the platform than the points between the ends was a natural condition which an employee, as a reasonably intelligent person, must be presumed to know and note, and omission to do so was an act of negligence.

2. In an action for negligent injury causing death of a servant by being crushed between a moving freight car and a railroad platform, it is *held* under the evidence that there was no duty on the part of the master to warn the servant of the peril complained of, and that the servant was guilty of negligence in assuming such place of danger to perform his duty.

3. The language of ch. 254, Laws of 1907, "In all cases under this act the question of negligence and contributory negligence shall be for the jury," in no way affects the judicial power of the court to determine the legal sufficiency of the evidence tending to prove the fact of negligence and contributory negligence.

4. Under ch. 254, Laws of 1907, providing that in all cases under that act the question of negligence and contributory negligence shall be for the jury, no jury question can arise unless the court first determines that the evidence adduced legally tends to prove such negligence.

5. Where the trial court has properly determined that there is no evidence tending to show negligence or contributory negligence there is no question of fact thereby presented to be resolved by the jury, notwithstanding the language of ch. 254, Laws of 1907, requiring in all cases under such act that the question of negligence and contributory negligence shall be submitted to the jury.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an action for damages arising out of the death of plaintiff's intestate, alleged to have been due to the negligence of the defendant. The complaint alleges:

"That on the 2d day of July, 1907, the plaintiff's intestate, J. M. Haring, was engaged in the performance of his duties as a switchman for the defendant in its said yards at Superior, Wisconsin; that at said time and place one of the defendant's large freight cars was being moved and pushed

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upon said switch track by the side of said platform by the defendant's engineer in charge of one of its locomotive engines under the direction of its switching foreman, and that as said car had moved a short distance upon said track by the side of said platform and was about to be brought to a standstill so as to be stopped, set, and blocked there, and the engine detached, the plaintiff's intestate, J. M. Haring, in the performance of his duties as such switchman, passed from the side of said switch track opposite to said platform by the end of said car, across said track and between said car and said platform, for the purpose of placing a block under the wheel of said car so that it would not run out of said switch track when detached from said engine, and that when he got between said car and said platform he was caught between the side of said car and said platform and then and there crushed and mortally injured to such an extent that he died as the result of such injuries on said July 2, 1907."

The accident occurred at a point where the track curved and where the platform was constructed on a curve corresponding to the curve of the track. As the car passed around the curve the ends of the car were about twenty inches from the edge of the platform; the center of the car five and one-half inches. Plaintiff's intestate stepped from in front of the approaching car into the open space between the end of the car and the platform, and as the center of the car reached him he was so crushed and injured that death resulted. The car was about to stop, and the deceased was ready to block the car and prevent its moving on the switch track beside the platform. The deceased was working as a member of a switching crew, consisting of an engineer, a fireman, a switch foreman who had charge of and directed the work, the switchman, and the deceased. At the time of the accident deceased was on the ground opposite the platform, while the other members of the crew were backing a car in with an engine. The other switchman was on the engine to give the signal for the stopping of the car. This could be given from either side of the engine to the engineer or the fireman. The plat-

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form near the track was used for loading, unloading, and holding freight, and was built practically on a level with the floor of the freight cars and in such close proximity as to permit moving light freight into and out of the cars. It was not designed to leave working space between the platform and the car, and it was not necessary for the deceased in the performance of his duties to step into this space. When it was free from obstruction it was customary to work on the engineer's side of the switch train, but the other, or fireman's, side was used when appropriate. Deceased's duty could properly be performed on the fireman's side of the car, which was open and free from structures and well adapted for blocking the car. It appears that the platform is built as freight platforms are commonly built, as to its proximity to the track and its height, and that the deceased, by stepping into a position between the car and the platform, voluntarily chose his place of work. Decedent had been in the employ of the defendant company for some years, performing various services which brought him into the freight yard upon and near the platform. During the month preceding the accident he had served most of the time with the switching crew, switching freight cars in the yard about this platform and on the switch tracks adjacent thereto.

The defense alleged contributory negligence on the part of the deceased and also introduced a release containing the following, signed by the father of the deceased:

"That, in consideration of said employment and the wages to be paid, the said party of the second part does hereby release said company from all claims, damages, or loss which may accrue to him, the said party of the second part, growing out of injuries which he, the said minor, may receive while in the service of said company, and that the said minor is subject to the employment by the said first party, at its pleasure, and that the said minor may execute a full release and satisfaction therefor without the consent of said parent or guardian."

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At the conclusion of plaintiff's case the defendant moved for a nonsuit, and this the court granted on the following grounds:

"(1) That plaintiff has failed to show any actionable negligence on the part of the defendant; (2) that if actionable negligence on the part of the defendant has been shown, still the court must say, as a matter of law, that the negligence of the deceased was greater than that of the defendant and contributed in a greater degree to produce the injury complained of."

This is an appeal from the judgment granting a nonsuit.

The cause was submitted for the appellant on the brief of *W. P. Crawford,* and for the respondent on that of *J. A. Murphy* and *C. H. Crownhart.*

SIEBECKER, J. The appellant contends that the trial court erred in dismissing the complaint, in holding that the evidence, as matter of law, showed that defendant was not negligent, and that plaintiff was chargeable with contributory negligence. It is urged that the defendant was negligent in not providing a sufficient working space between all parts of the car and the edge of the freight platform along the curve adjacent to the track. The proof is that the platform is so located that it provides only sufficient space between moving freight cars and the edge of the platform to prevent contact between them, and that it was not designed to provide a working space at this point. It is also shown that this is the common method of building such freight platforms. We find nothing in the case calling for a different construction of this appliance for properly conducting this part of the railroad business. Appellant contends that the case of *Dorsey v. Phillips & C. C. Co.* 42 Wis. 583, and similar cases are in point to show that it was negligence not to leave a safe working space between the edge of the platform and the freight cars on the adjacent tracks. These cases do not rule this one, because in

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those cases the servant was expected to occupy the unsafe place in the performance of his duty, while in the instant case the servant was not required to perform his duties where he was injured. Its use as a platform for the purpose of loading and unloading freight was best served by locating it so as to have as small a space as possible between it and the cars on the adjacent tracks. It is not shown that the company was negligent in so constructing it. It is contended that the case of *Hemmingsen v. C. & N. W. R. Co.* 134 Wis. 412, 114 N. W. 785, is on all-fours with and rules this case. An examination of the facts of that case discloses that the platform was near the side-track at a manufacturing plant, used very rarely; that there was a space between the cars and the edge of the platform of from eleven inches to two feet or more; that the platform varied in height; that the side-track near it was not used much; that the brakeman in that case was engaged in giving signals for the movement of the engine and cars onto the track near the platform; that he took the position between the car and the platform to signal on the engineer's side, without knowing how close the cars came to the platform, and that while standing in the open space between the car and the platform he was caught by a projecting handhold and injured. The court lays stress on defendant's negligence and decedent's contributory negligence, on the fact that the platform and track were rarely used by the railway company, that the decedent was ignorant of the danger of the situation in view of the opening between the cars and the platform, and on the fact that the trial court in passing on these questions had resolved them in favor of the injured party. These features of the *Hemmingsen Case* distinguish it from the instant one in a number of material respects, in that the evidence showed negligence on the part of the defendant and that the plaintiff was free from contributory negligence, and in that the trial court in that case held that the evidence called for submission to the jury of the issues of negligence and contributory negligence.

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Appellant claims that the position of the car on the curve of the track left an open space between the ends of the car and the edge of the platform, and that this would naturally invite employees to occupy this space and lead them to believe they were in a safe place, and that therefore such a construction rendered the appliance defective and unsafe. Nothing unusual or extraordinary results from a car passing over a curve in proximity to a platform. It is manifest that this was an appropriate way of constructing the car and platform. The fact that the ends of the car in passing over the curve would be farther away from the platform than the points between the ends is a natural condition which the deceased, as a reasonably intelligent person, must be presumed to know and note, and his omission to do so was an act of negligence. *Tuttle v. D., G. H. & M. R. Co.* 122 U. S. 189, 7 Sup. Ct. 1166.

It is also urged that the defendant was negligent in not warning the deceased of the danger incident to the performance of his duty at the place in which he was working. This question and that of contributory negligence are inseparably connected under the facts of this case. It appears that the deceased was about twenty-one years of age; that he was fully of the average intelligence of men of that age; that he had several years' experience in the railroad business, and that he had observed the manner of conducting the freight-yard switching and handling of freight cars in proximity to this freight platform. It is shown that the danger complained of was an open and obvious one to persons possessed of ordinary intelligence; that the business was conducted in the manner usual in railroad operation; that the deceased was not ordered or called on to take the position he assumed; that a safe and appropriate place on the side of the car opposite the platform was provided to perform his duties, and that he voluntarily chose this place of danger to perform his duty. Under these circumstances the danger cannot be held to be an abnormal or extraordinary one, but it is one common

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to the conduct of the business and obvious to a man of ordinary intelligence, knowledge, and experience while in the exercise of ordinary care. Under these circumstances there was no duty to warn deceased of the peril complained of, and he was guilty of negligence in assuming this place of danger to perform his duty.

The plaintiff contends that it was error, in the light of the provisions of ch. 254, Laws of 1907 (sec. 1816, Stats.), for the trial court to dismiss the complaint, upon the grounds that it appeared from the evidence, as matter of law, that the defendant was not negligent as charged, and that plaintiff's intestate was guilty of contributory negligence. It is claimed that the case should have been submitted to the jury, because this act provides: "In all cases under this act the question of negligence and contributory negligence shall be for the jury." It is argued that this case is one of negligence and contributory negligence, that it is embraced in this act, and hence that those questions could only be determined by the jury. The effect of this provision of the act has been fully considered in the case of *Kiley v. C., M. & St. P. R. Co.* 138 Wis. ——, 119 N. W. 309, and it requires no further discussion at this time. It is there determined that this provision of the act in no way affects the judicial power of the court to determine the legal sufficiency of the evidence tending to prove the fact of negligence and contributory negligence, and that no jury question can arise unless the court first determine that the evidence adduced legally tends to prove these facts. Since the trial court properly determined that there was no evidence tending to show negligence, there was no question of fact to be resolved by the jury.

The court properly awarded judgment dismissing the complaint.

By the Court.—Judgment affirmed.

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HOLMAN, Respondent, vs. LUECK, Appellant.

December 15, 1908—January 5, 1909.

Garnishment: Effect as between garnishee and third persons: Judgment: Res adjudicata: *Dismissal of appeal from justice's court: Effect.*

1. In an action by the plaintiff, assignee of a nonnegotiable note, the defendant pleaded payment under a judgment of a justice of the peace in an action wherein defendant was summoned as garnishee. In that action, while defendant as such garnishee was present in court, the deposition of such assignee was put in evidence, wherein such assignee testified that he claimed to own the note. Defendant took no steps to notify the assignee of the garnishment action, and failed to proceed as provided in sec. 3723*b*, Stats. (1898), to bring the assignee into the garnishment suit and thus protect himself against double liability. *Held:*

   (1) Payment of the judgment in the garnishment action was no defense in the instant action.

   (2) The proof was sufficient *prima facie* to establish notice of the assignment of the note.

2. A judgment of dismissal, "without prejudice to the plaintiff's right to bring another action," of an action regularly before the circuit court on appeal from a justice's judgment (whether the order of dismissal was regular or not), left no judgment in the justice's court, and constituted no bar to a subsequent action.

3. Such judgment of dismissal, if erroneous, constituted error within the jurisdiction of the circuit court.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This is an appeal from a judgment in favor of the plaintiff and against the defendant on two promissory notes, one for $125 and the other for $53.52. The action was brought in justice's court, where judgment was rendered in favor of the defendant, and upon appeal to the circuit court a verdict was directed in favor of the plaintiff subject to the opinion of the court upon questions of law. It was stipulated that any

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questions of fact arising might be decided by the court without a jury. The court, after having the case under advisement for a considerable time, rendered judgment in favor of the plaintiff and against the defendant for the amount of the notes, $213, damages, and costs taxed at $36.77. The two notes were similar in form, made by defendant *Charles Lueck,* and contained the provision authorizing confession of judgment at any time after date before or after due, were nonnegotiable, and payable to Charles F. Daebel or order. The claim of the plaintiff is that the notes were for a valuable consideration transferred to him. The defense to this action was that defendant had paid the notes under former garnishments in two suits against Daebel, payee, brought by one Radke, and in which defendant here was garnished; and also a former judgment pleaded in bar in the instant action, which judgment was rendered in a prior action between the parties to this action originally commenced in justice's court and judgment rendered for the defendant, and appeal taken to the circuit court, where the action was dismissed without prejudice to the plaintiff's right to bring another action.

For the appellant there was a brief signed by *Marsh & Schoengarth,* and oral argument by *S. M. Marsh.*

For the respondent there was a brief by *Ryan, Merton & Newbury* and *Homer S. Clark,* and oral argument by *E. Merton.*

KERWIN, J. The appellant contends (1) that the plaintiff's cause of action was barred by payment under orders of the court in the garnishee proceedings; and (2) that judgment in former action between the same parties to this action is a bar.

1. Under the first contention it appears from the record that two actions were commenced in justice's court by one Radke against Daebel, payee named in the notes here in

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suit, one in September, 1903, and the other in April, 1904, and the defendant in this action garnished in said actions. Such proceedings were had that judgment was rendered against the defendant Daebel in said actions, and orders entered requiring the defendant here to pay the amount of his indebtedness on said notes into justice's court in satisfaction of said judgments. The money was paid into the justice's court in compliance with the orders. The question arises whether the payment by defendant *Lueck* under the former garnishee proceedings is a defense to the instant action, and this question turns upon whether the defendant *Lueck* had notice that the present plaintiff, *Holman,* claimed to own the notes. It is insisted on the part of the appellant that there is no proof of notice to defendant *Lueck.* In the first garnishee action brought in justice's court before referred to, the Commercial State Bank as well as defendant *Lueck* was garnished. On the return day of the garnishee summons the bank appeared by its attorney and *Lueck* appeared in person. The case was adjourned for three weeks, and on the adjourned day the bank appeared by its attorney, and *Lueck* appeared in person and made oral answer. The bank also answered by way of general denial. During the proceedings on the adjourned day the depositions of Charles Daebel, *Mr. Holman,* and Mrs. John Schafer were put in evidence by the bank. The contents of these depositions disclosed the fact that *Holman,* plaintiff here, claimed the notes in suit. The present suit was commenced in justice's court after the Radke garnishee proceedings where judgment went for defendant, and on appeal to the circuit court judgment was given for the plaintiff upon the two notes. In the Radke garnishee action the defendant *Lueck* took no steps to bring notice to *Holman* of the Radke garnishee, and failed to proceed as provided by sec. 3723*b,* Stats. (1898), to bring the defendant *Holman* into the Radke garnishee suits and thus protect himself against double liability. So, if defendant

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Lueck had notice of the claim of plaintiff *Holman* in time to avail himself of the statutory protection, the payment under the orders in the Radke garnishees is no defense against the plaintiff *Holman*. *Adams v. Filer*, 7 Wis. 306; *John R. Davis L. Co. v. First Nat. Bank*, 84 Wis. 1, 54 N. W. 108; *Frels v. Little Black F. Mut. Ins. Co.* 120 Wis. 590, 98 N. W. 522. The court below held that defendant had notice. The record in justice's court in the Radke garnishee action shows that *Lueck* was in justice's court on the adjourned day and was put upon the witness stand and examined respecting the pending issue. On the same day and, as appears from the justice's docket, at or about the same time the defendant *Lueck* was examined, the depositions of Daebel, *Holman*, and Mrs. Schafer were put in evidence, and it further appears that the $125 was in possession of the bank, garnishee. The depositions having been filed with the justice, setting forth plaintiff's claim to the notes on the adjourned day, and at or about the time *Lueck* was in court and being examined, we think the evidence sufficient to warrant the court below, in the absence of any showing to the contrary, in finding that defendant *Lueck* had notice of plaintiff's claim to the notes. It also appears that no denial by defendant was made of notice. If, as a matter of fact, he had no actual notice of the contents of the depositions, he doubtless would have gone upon the stand and so testified. We think the proof was sufficient *prima facie* to establish notice. 16 Cyc. 1072; *John R. Davis L. Co. v. First Nat. Bank, supra.*

2. Action was brought in justice's court on the notes in suit. Judgment was rendered against plaintiff and he appealed to the circuit court. The plaintiff took a dismissal in circuit court, and obtained an order of dismissal "without prejudice to the plaintiff's right to bring another action." Afterwards the present action was commenced, and it is insisted that the former judgment of dismissal was a bar. We

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cannot agree with appellant in this contention. The circuit court had jurisdiction on appeal of the parties and the subject matter, and, whether the order of dismissal was regular or not (a point we do not decide), it is clear that it was within the jurisdiction of the court to make it. The whole case was removed from the justice's court by the appeal, and the action was in the circuit court for all purposes. When the action was dismissed in circuit court it was out of both courts, justice's and circuit, for all purposes. There never having been a trial on the merits in the circuit court, where the case was regularly carried by appeal, and the case having been dismissed by order of the court without prejudice to the plaintiff's right to bring another action, we see no ground for holding that the former judgment is a bar. The dismissal of the action in circuit court left no judgment in the justice's court. But it is argued by counsel for appellant that because no affidavit for new trial was filed on the appeal and the judgment not exceeding $15, exclusive of costs, the appeal could be heard only on the original papers under secs. 3767, 3768, Stats. (1898), and therefore the circuit court could not dismiss the action, but must proceed to dispose of it in the manner provided by sec. 3769, Stats. (1898), namely, to give judgment according to the weight of the evidence and the justice of the cause, without regard to errors which do not affect the merits and without regard to the findings of the justice, and may amend pleadings, render an affirmative judgment, or affirm or reverse the judgment in whole or in part, either as to damages or costs, or both, as to any of the parties, and for errors of law or fact.

It is unnecessary to determine upon this appeal whether the court below was in error in dismissing the action. If error, it was error within its jurisdiction. Counsel for appellant seem to think that the court had power to dismiss the action, and that the wrong committed was in dismissing it without prejudice, because, the case being before the circuit

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court for review, the dismissal operated as a bar to any subsequent action upon the notes. But the judgment of dismissal could not have this effect. The justice's judgment was disposed of by the appeal and dismissal of the action, and the order of dismissal superseded the justice's judgment and terminated the action. The court had jurisdiction to render a judgment and dispose of the case. It did so, and whether the judgment was right or wrong it was no bar to the present action. It follows that the judgment below was right and must be affirmed.

By the Court.—The judgment is affirmed.

OLSON, Respondent, vs. TOWN OF CURRAN and others, Appellants.

December 15, 1908—January 5, 1909.

Highways: Establishment: Award of damages: Jurisdiction of town board: Equity: Adequate remedy: Exclusive remedy.

1. Even though the order of the town board laying out a highway specifies all the land which the supervisors consider damaged, it is not necessary that it should specify all adjacent land which the board do not consider damaged or with regard to which the benefits may equal the damages.
2. Town supervisors, having jurisdiction to decide what lands were damaged by the laying out of a highway, decided that the only damages sustained by the plaintiff by reason of the taking of land and laying out of the highway were upon one of two forties of plaintiff's land. *Held*, if the town board were in error in so doing, that it was error within their jurisdiction, which resulted in an insufficient allowance, and plaintiff's remedy was by appeal under the provisions of sec. 1285, Stats. (1898).
3. In such case plaintiff is not entitled to equitable relief, not because he had an adequate remedy at law within the ordinary meaning of that expression, but upon the ground that the statutory remedy, in cases where it may be followed, is exclusive, and that a court of equity has no right to say that shall not be done which a valid statute authorizes to be done.

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APPEAL from a judgment of the circuit court for Jackson county: E. RAY STEVENS, Judge. *Reversed.*

The appeal is from a judgment perpetually enjoining the supervisors of the town of *Curran* from opening a highway.

R. S. Cowie, for the appellants, cited, among other cases, *State ex rel. Dosch v. Ryan,* 127 Wis. 599, 106 N. W. 1093; *State v. Castle,* 44 Wis. 670; secs. 1270, 1285, Stats. (1898); *Tallman v. McCarty,* 11 Wis. 401; 1 High, Injunctions, §§ 579, 582, 594; *State ex rel. Jenkins v. Harland,* 74 Wis. 11, 41 N. W. 1060; *State v. Haas,* 52 Wis. 407, 9 N. W. 9; *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, 14 N. W. 273.

G. M. Perry, for the respondent, among other references, cited *Norton v. Peck,* 3 Wis. 714; *State ex rel. Andrews v. Oshkosh,* 84 Wis. 548, 54 N. W. 1095; Elliott, Roads & Streets (2d ed.) § 194*a*; *Orth v. Milwaukee,* 92 Wis. 230, 65 N. W. 1029; *Bigelow v. West Wis. R. Co.* 27 Wis. 478; *Leonard v. Rogan,* 20 Wis. 540; 1 Pom. Eq. Jur. (2d ed.) § 130; *Amis v. Myers,* 16 How. 492; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *Morris v. Ferguson,* 14 Wis. 268.

TIMLIN, J. This case is brought before the court only upon the pleadings, findings, and judgment of the court below. The complaint makes very broad claims of error and irregularity in the proceedings laying out the highway, but these are narrowed down by the findings, and the question for determination here is: Are the findings sufficient to support a judgment enjoining the opening of the highway?

A synopsis of the findings may be given as follows:

"The plaintiff owned the northwest quarter of the southwest quarter of section 33 and the southeast quarter of the southeast quarter of section 32 adjoining, and a parcel of land about four square rods in area in the southeast corner of the northeast quarter of the southeast quarter of said section

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32, all in the town of *Curran*. The projected highway is wholly upon and crosses the northwest quarter of the southwest quarter of section 33, owned by the plaintiff, from north to south at the western boundary of said subdivision. No part of the highway is upon any part of plaintiff's land which is situate in section 32. All of plaintiff's land is used together for farm purposes, and the highway divides plaintiff's land lying in section 33 from his land lying in section 32. The board assessed damages upon separate parcels or government subdivisions of land owned by the person to whom the damages were assessed. The only damages awarded to plaintiff by the board were assessed upon said subdivision through which the highway was run. The board assessed no damages in favor of the plaintiff upon any property owned by the plaintiff in section 32. The board did not determine whether the plaintiff sustained any damages from the laying out of said highway so far as said land in section 32 was concerned."

This must have reference to the order awarding damages for the taking, incorporated into the complaint, from which we quote:

"We, the said supervisors, did, at the time of making said order, assess damages which such owners will severally sustain by reason of the laying out of such highway through their lands, and, having taken into consideration the benefits which each owner aforesaid may receive thereby, we award such damages as follows, to wit: . . . To *John Olson* and Charles Olson estate on N. W. ¼ of S. W. ¼ section 33, etc., we have assessed and hereby award the sum of $125 as such damages."

Sec. 1285, Stats. (1898), together with ch. 331, Laws of 1901, authorize an appeal from the award of damages either by the landowner in his own behalf or by other taxpayers in behalf of the town. It is not contended that the supervisors were without jurisdiction to lay out the highway in the instant case, but merely that by reason of the form of the award the supervisors did not consider the damage to the lands adjacent to the proposed highway and lying in section 32.

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We are not disposed to acquiesce in this narrow construction of the terms of the award. The highway is on the northwest quarter of the southwest quarter of section 33 and that subdivision was properly named in the award, and perhaps, to be strictly accurate, the award should specify all the land which the supervisors considered damaged. But, even if we should say this was required, it cannot be that they must specify all adjacent land which they considered not damaged or with regard to which the benefits may equal the damages. The result is that the supervisors, having jurisdiction so to decide, did decide that the only damages sustained by the plaintiff by reason of the taking of land and the laying out of the highway were upon the northwest quarter of the southwest quarter of section 33. In this they may have been in error; but for any error of this kind within their jurisdiction which results in an insufficient allowance, the plaintiff's remedy is by appeal, under sec. 1285, Stats. (1898). The findings therefore present a case showing that the plaintiff was not entitled to the equitable relief awarded by the circuit court, not on the ground that he has an adequate remedy at law within the ordinary meaning of that expression, but upon the ground that the statutory remedy, in cases where it may be followed, is exclusive, and that a court of equity has no right to say that shall not be done which a valid statute authorizes to be done. *Stone v. Little Yellow D. Dist.* 118 Wis. 388, 393, 95 N. W. 405.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the complaint.

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COWLES, Plaintiff in error, vs. CITY OF NEILLSVILLE, Defendant in error.

December 16, 1908—January 5, 1909.

Criminal law and practice: Appeal from police court: Notice: Mistake in title of action: Jurisdiction of appellate court.

Sec. 4761, Stats. (1898), providing for appeals in criminal cases from justices' courts, which by sec. 2, ch. 190, Laws of 1889, governs the police court of the city of Neillsville, provides that the appellant shall "*give* said justice *notice thereof in writing* within twenty-four hours." In an action in such police court the defendant was convicted of the violation of a city ordinance and by mistake entitled the action in his notice of appeal as "State of Wisconsin," plaintiff, instead of "City of Neillsville." *Held*, that the call of the statute was satisfied notwithstanding the erroneous title.

ERROR to review a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Merrill Cowles was convicted in the police court of the city of *Neillsville* of a violation of a city ordinance and attempted to appeal therefrom to the circuit court. The law governing appeals from any judgment of that court imposing a fine, penalty, or imprisonment provides that appeals shall be taken within the same time and in the same manner as appeals from justices' courts in criminal actions. Sec. 2, ch. 190, Laws of 1889. The notice of appeal was given within the time provided by law, but by mistake was entitled *"State of Wisconsin v. Merrill Cowles"* instead of *"City of Neillsville v. Merrill Cowles."* The notice specified the judgment appealed from as the judgment "in this action," but described it correctly in all other respects. A proper recognizance, as required by secs. 4761, 4714, Stats. (1898), accompanied the notice, which, however, was not entitled, but properly described the offense and the judgment. The police justice immediately noted the filing of the notice

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and recognizance in his docket and made due return to the circuit court. Upon motion the appeal was dismissed for lack of jurisdiction, and *Cowles* brings his writ of error to reverse the judgment.

George L. Jacques, for the plaintiff in error

Homer C. Clark, for the defendant in error.

WINSLOW, C. J. The defect in the notice of appeal, which was held to be fatal, was that the state was named as the plaintiff instead of the city. The error was noticed by no one at the time and misled no one. The justice knew perfectly well to what judgment the notice was in fact directed. He made entry of the appeal, accepted the recognizance, and made his return in due course as if the notice were perfect, as in fact he supposed it was. The offense charged was the sale of intoxicating liquor to a minor, which is an offense against the laws of the state as well as against the ordinances of the municipality, and hence the mistake in the title was a very natural one. The question whether the defect was of so serious a character as to deprive the appellate court of jurisdiction must depend upon the construction given to the statute which prescribes the notice to be given, viz., sec. 4761, Stats. (1898). This section provides that the appellant shall "*give* said justice *notice thereof in writing* within twenty-four hours." Counsel have referred us to no cases construing this section and we have found none; hence we are not fettered by any previous adjudication on this subject. In support of the ruling of the trial court, reliance is placed upon the decisions of this court in relation to notices of appeal in civil cases beginning with *Widner v. Wood,* 19 Wis. 199. The civil appeal statute (sec. 3754, Stats. 1898) requires the appellant to *make and present* to the justice a notice of appeal. The early decisions under this section, notably *Widner v. Wood, supra,* and *Chinnock v. Stevens,* 23 Wis. 396, laid down a rigid rule of nicety with regard

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to the notice of appeal which hardly accords with the general principle that the right of appeal from inferior tribunals is favored in the law. While these cases have not been overruled it is certainly true that they have been seldom cited, and in the more recent cases the rule that there must be strict compliance with every detail of the statute has been much encroached upon, and the more sensible rule of substantial compliance adopted in its place. Under this latter rule it seems that inaccuracy or mistake in the description of the judgment appealed from will not invalidate the notice, if, notwithstanding such inaccuracy or mistake, the judgment intended is designated with reasonable certainty. *Schweppe v. Wellauer,* 76 Wis. 19, 45 N. W. 17; *Friemark v. Rosenkrans,* 81 Wis. 359, 51 N. W. 557; *Noall v. Halonen,* 84 Wis. 402, 54 N. W. 729; *Hender v. Ring,* 90 Wis. 358, 63 N. W. 282; *Patrick v. Baldwin,* 109 Wis. 342, 85 N. W. 214; *Ladd v. Witte,* 116 Wis. 35, 92 N. W. 365; *Wattawa v. Jahnke,* 116 Wis. 491, 93 N. W. 547. Under this more reasonable doctrine it seems at least doubtful whether the strict rule laid down in *Widner v. Wood* would now be adhered to.

However this may be, the present case involves the construction of an entirely different statute, which does not require the making and presentation of a notice (carrying the idea of a somewhat formal, legal document), but only that the appellant shall give the justice notice in writing. The appellant is to give the justice notice in writing of his appeal. That is all. Doubtless it was not expected that there should be great formality observed. The notice must be given at once, and not at any time within twenty days as in civil cases. The defendant might often be obliged to prepare it himself, without the aid of counsel, in order not to lose his right. These and other considerations which might be named seem to preclude the idea that any very formal document was intended, but rather that there should be given to

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the justice some written paper, which, though informal, sufficiently gave knowledge to the justice that an appeal was taken and in what case it was taken. Such knowledge was given to the police justice in the present case, notwithstanding the unnoticed error in the title of the cause. There was evidently no doubt or uncertainty in his mind as to the case in which the appeal was taken. Indeed, the body of the notice gave the date of the judgment, its amount, and its provision for imprisonment in default of payment in exact terms, so that it could not be mistaken as intended to apply to any other case.

Under these circumstances we hold that the call of the statute was satisfied notwithstanding the erroneous title. As matter of fact, the justice received notice in writing from the appellant of his appeal and acted upon it.

By the Court.—Judgment reversed, and action remanded for further proceedings according to law.

CLEMONS, Administrator, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

December 17, 1908—January 5, 1909.

Railroads: Injuries at crossings: Duty of traveler: Diversion of attention: Looking and listening: Excuses: Appeal and error: Review: Findings, when disturbed: Contributory negligence: Statutes.

1. Mere diversion of attention will not justify failure of a person about to cross a railroad track upon a highway to seasonably look and listen to discover presence in dangerous proximity of an approaching train. Failure to see such train and keep out of its pathway, when there is opportunity for doing so, is only excusable where attention is irresistibly forced to something else.

2. The conclusion of a trial court respecting sufficiency of evidence as to an issue of fact to require its solution by the jury should

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not be disturbed upon appeal unless it appears, clearly, that such conclusion was wrong, giving due weight to the superior advantages of the trial court for understanding the situation.

3. The presence of a railway track is such an admonition of probability of danger to one entering thereon that nothing short of physical impossibility will excuse neglect of a traveler to use his senses of sight and hearing to discover whether a train is dangerously near or not before entering upon such track.
4. In case of a train being in sight and coming towards a highway crossing of a railway track, as a traveler approaches intending to make the crossing, the duty to look and listen and keep out of the pathway of such train is not excused by any regulation as to the legal rate of speed of trains.
5. Assumption as to the speed of a moving train because of a legal regulation may be indulged in when the train is not in sight but not otherwise.
6. Where a person approaching a highway crossing of a railway track has ample opportunity for seeing and keeping out of the pathway of a coming train by exercising the care required of him in respect thereto as matter of law, and nevertheless places himself in such pathway and is killed, leaving no eye-witness of the circumstances thereof, such facts unexplained establish contributory negligence upon the doctrine of *res ipsa loquitur*.
7. Ch. 595, Laws of 1907, as to contributory negligence in certain cases, does not apply to any cause of action existing at the time of its enactment.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action to recover damages for death of the intestate, claimed to have been caused by actionable negligence of defendant.

Plaintiff's claim was that the deceased, a boy of fourteen years of age, while in the exercise of ordinary care, riding in a cutter with his sister, a school teacher, whom he was taking to her school, the cutter being drawn by a single, gentle horse, journeying on the highway which crossed defendant's track, was, as he entered upon the track, run into by one of defendant's passenger trains, going at a great rate of speed and without giving any signal of its approach by the sounding of the engine bell or blowing of the engine whistle, whereby he was instantly killed. The answer put in issue all allegations as

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to defendant's negligence and pleaded contributory negligence.

One of the principal controversies on the evidence was as to whether the deceased, as he approached the railroad crossing, had ample opportunity to see or hear, or both, the approaching train in time to stop his horse and avoid colliding with the train. There was little or no controversy but that he had such opportunity at least from the time he was within 100 feet of the track and that he had such opportunity thereafter continuously until he was at the point of danger, unless his horse escaped from his control after reaching a point sixty-six feet from the track.

The jury rendered the following verdict:

"(1) Was the whistle blown eighty rods from the crossing where the collision occurred? *A.* No.

"(2) At what rate of speed was the train moving as it approached and passed over the crossing where the collision occurred? *A.* Forty miles per hour.

"(3) Was the horse running away beyond control from a point about sixty-six feet from the crossing until the collision occurred? *A.* No.

"(4) If you answer the last question 'Yes,' then was the fact that the horse was so running away beyond control the proximate cause of the accident? *A.* No.

"(5) Was there failure to exercise ordinary care by the defendant railroad company in the manner in which it managed and conducted the train respecting its speed and whistling as it approached and passed over the crossing where the collision occurred? *A.* Yes.

"(6) If you answer the last question 'Yes,' then was such failure to exercise ordinary care the proximate cause of the injury and death of Charles B. Clemons? *A.* Yes.

"(7) Did any want of ordinary care on the part of Charles B. Clemons contribute to produce his injury? *A.* No.

"(8) In case the court shall be of the opinion that plaintiff is entitled to recover, at what sum do you assess his damages? *A.* 3,250 dollars."

The court on motion changed the answer to the first question from "No" to "Yes" and made a like change as to the

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seventh question, and rendered judgment in favor of the defendant. Exceptions were duly preserved for consideration in case of appeal, which was subsequently taken by the plaintiff.

W. H. Frawley and *T. F. Frawley,* for the appellant.

For the respondent there was a brief by *James B. Sheean* and *Bundy & Wilcox,* and oral argument by *R. P. Wilcox.*

MARSHALL, J. The first matter presented is: Did the court err in changing the answer of the jury to the first question from the negative to the affirmative? We pass that as immaterial because of the conclusions reached respecting other questions.

The next in order is: Must the answer of the jury to the third question be understood as finding that the horse was under control of the deceased while traveling the last sixty-six feet before reaching the point of collision, so that he might have stopped and avoided the accident? That, it seems, must be answered in the affirmative. The evidence shows there was a studied effort by appellant's counsel to bring the case within the rule of *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, 46 N. W. 165, as explained and limited in *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *Hain v. C., M. & St. P. R. Co.* 135 Wis. 303, 116 N. W. 20; *Smith v. C., M. & St. P. R. Co.* 137 Wis. 97, 118 N. W. 638, and similar cases, that diversion of a driver's attention will not justify failure to seasonably look and listen at a highway crossing of a railroad track and to take notice of the dangerous proximity of a train if one is in plain sight or hearing and avoid getting in its way, except where the attention is irresistibly forced to something else so as to deprive such driver of opportunity to do so. To do that evidence of a circumstantial character, there being no direct evidence obtainable, was presented to maintain that during the sixty-six feet before reaching the crossing, not momentarily but substantially throughout, the deceased did not have reasonable opportunity for taking no-

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tice of the coming train. The learned trial court brought to the attention of the jury all the evidence on the subject. Near and at the close of the instructions were the words:

"You should not find that the horse was beyond control and unmanageable if it momentarily shied or jumped. The inquiry is whether the horse for substantially this whole space was in a condition of runaway beyond control."

Facing that, as the jury must have done, there is no escaping the conclusion that they reached the decision that deceased during the space of four rods, the distance across a common highway, might have stopped, and would have done so and avoided the collision, had he tried. We cannot do violence to the language of question and answer and come to a different conclusion, as the learned counsel for appellant would have us do. These distressing situations draw heavily upon human sympathy, but with a proper appreciation of judicial duty and with a proper measure of courage to perform it they will not incline the mind away from judgment based on reason.

So we pass to the next question, merely noting on the way manifest confirmation of the foregoing contained in the fourth finding, to the effect that the collision between the horse and the railroad train is not attributable to the horse being beyond the control of the driver.

Such next question is this: Did the court err in changing the negative answer as to whether the deceased was guilty of contributory negligence, to the affirmative?

In considering such question, rightly, we must keep in view several firmly established legal principles. First in order is the one that a conclusion of a trial court, respecting sufficiency of evidence as to any fact in issue to present a jury question, should not be disturbed unless it appears from the record to be clearly wrong, giving due weight to the superior advantages which such court had for discovering the truth. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Bohn v. Racine,* 119 Wis. 341, 96 N. W. 813; *Lam Yee*

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v. State, 132 Wis. 527, 112 N. W. 425. That valuable principle in the administration of justice is the deciding factor in situations which are doubtful from an examination of the record. It must be always assumed the trial court paid careful heed to the trial from the beginning until the time of its judgment being invoked as to there being reasonable conflicting inferences from evidence; that he noted the deportment of witnesses and was appreciatively alert to appearances and incidents in the trial, not transferable to the written history thereof, but helpful in arriving at correct judgment. And further he assumed that in reaching the decision the elementary principle was in mind and given due weight, that unless evidence as to an issue is so obviously one way as to leave no room for unbiased minds to reasonably reach a conclusion out of harmony therewith, it is for the jury. *Powell v. Ashland I. & S. Co., supra.*

Next in order is the principle that a railroad track is such an admonition of danger that he who approaches it at a highway crossing with knowledge thereof, intending to cross the same, must use his senses of sight and hearing to discover whether there is any reasonable probability of his placing himself in dangerous proximity to a moving train if he proceeds; that he is not only bound to look and listen to discover whether a train is dangerously near or not, but is bound to make the discovery of one if there be such plainly visible, or plainly within hearing, and to use his senses in that regard at the last opportunity before going upon the track, and that mere diversion of attention will not excuse nonperformance of these duties.

The rule above stated has been laid down concisely and in unmistakable language many times in recent years, as for instances:

In *Goldmann v. Milwaukee E. R. & L. Co.* 123 Wis. 168, 101 N. W. 385:

"Due care in approaching a railway track can be satisfied only by the full use of the senses of sight and hearing at the

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last moment of opportunity before passing the line between safety and peril."

In *Guhl v. Whitcomb,* 109 Wis. 69, 75, 85 N. W. 142, 144:

"All exception to the duty to look and listen at a railway crossing resulting from a diversion of attention has been repudiated by this court except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty."

Again in the same case:

"The known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution."

And further in *Marshall v. G. B. & W. R. Co.* 125 Wis. 96, 103 N. W. 250:

"The presence of a railway track is such an admonition of the probability of danger to one entering thereon, that nothing but physical impossibility will excuse his neglect to use his senses of sight and hearing to discover whether a train is dangerously near or not, before so doing. A person is not only bound to look and listen for such a train before entering upon a railway track, but is bound to hear and see one, if there is such, and reasonable attention to the matter will enable him to do so, and if he attempts to cross the track in violation of such duty or in the face of danger after discovering it, he takes in his own hands the entire responsibility for what may follow as to injuries to himself, though produced in part by negligent conduct of the railway trainmen. One cannot reasonably expect the law to hold others responsible for his personal safety, as regards their mere negligence, if he sees fit to disregard such safety himself."

Next in order is the rule that one in approaching a railway track is not excused from the duty to look and listen for a train and to regulate his course accordingly, because of any regulation as to the speed of trains, nor warranted in acting upon judgment as to the probability of time it will take such

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train to reach the crossing if it is not coming at an excessive rate, in case of its being in sight, and if running at such rate it is likely to reach the crossing before one could safely pass over the same; that one must assume, as within probabilities, that a train may be running at greater than the legal rate. *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378, 386, 75 N. W. 169; *Vant v. C. & N. W. R. Co.* 101 Wis. 363, 368, 77 N. W. 713; *Goldmann v. Milwaukee E. R. & L. Co.* 123 Wis. 168, 101 N. W. 384.

"Assumptions as to the speed of moving trains in cities may be indulged when they are not in sight, but cannot be relied upon by travelers who have a plain view of the coming train."

A further important principle is this: While contributory negligence must be affirmatively established by the defendant when not disclosed by the plaintiff's evidence, that does not preclude its establishment because of the imperiled person having been killed leaving no eye-witness of the event. The duty to look and listen and to see or hear a train in plain sight or hearing and to keep out of its pathway is such that in case of failure to do so, in absence of evidence to the contrary, a presumption of due care is displaced by the presumption of negligent failure to discover the danger or negligent effort to cross the track in face of danger. *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, 67 N. W. 1120; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295; *Buckmaster v. C. & N. W. R. Co.* 108 Wis. 353, 357, 84 N. W. 845; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *Ullman v. C. & N. W. R. Co.* 112 Wis. 150, 164, 88 N. W. 41.

Without suggesting that *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375, 39 N. W. 856, upon which counsel most rely as to this branch of the case, was, in view of the peculiar facts there disclosed, improperly decided, we may well say in passing that some things said in the opinion are quite out

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of harmony with the decisions of this court during the last twenty years, and with rules of law firmly established by such decisions, and we may say, in the same connection, out of harmony with decisions made prior thereto by this court and decisions generally in other jurisdictions.

In *Haetsch v. C. & N. W. R. Co.* 87 Wis. 304, 58 N. W. 393, the facts were so like those in the *Winstanley Case* as to confirm what we have said. The learned justice who wrote the opinion in one wrote the opinion in the other. The facts in the later case were very much like those in the one at hand. Plaintiff relied upon want of any direct evidence as to the conduct of the deceased immediately before the happening of the accident. Speaking to the situation the court said:

"We have these positive and material facts: (1) That the deceased could have seen the train approaching if he had looked, or could have heard it if he had listened, before he came upon the crossing. (2) He came upon the crossing and was killed by the train. (3) The presumption in favor of life is that he came upon the crossing without seeing the train or knowing that it was so near. Therefore, he did not look or listen, and therein he was negligent. If he did look, and saw the train approaching and so near the crossing, and then drove and ran his horse, supposing that he could pass the crossing ahead of the train, as seems quite plausible, he was grossly negligent. These facts, clearly established by the evidence, are conclusive of the want of common care of the deceased that contributed to his death. Under the same circumstances, if a plaintiff should testify in his own case of injury, that he did look and listen before driving upon the crossing, we would say, as the supreme court of Pennsylvania said in *Myers v. B. & O. R. Co.* 150 Pa. St. 386, 24 Atl. 747, 'that it is trifling with justice to permit a jury to find that it is true.' That the deceased did look and did not see the train was a natural and physical impossibility."

It is not infrequent in a case of this sort where death, or unconsciousness terminating in death, was instantaneous, leaving no one to tell how it occurred, that the personal repre-

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sentative, pinning his faith to the rule that contributory negligence must be affirmatively established and absence of direct evidence of the fact in issue, confidently challenges defendant to prove his case and with no less confidence urges here affirmance or reversal according to his interest, not appreciating that *res ipsa loquitur* applies to such a situation, when the facts indicate that had the deceased done those things which he was in duty bound to do or take the risk of failure, the accident would not have happened, the result establishes negligence.

The foregoing principle applies with more than ordinary force in this case in view of the verity that there was nothing interfering with capacity of the driver to stop his horse at a safe distance from the track and the fact that the trial judge, for a better understanding of the evidence, with the jury took a careful view of the physical situation.

In determining the question of whether the trial court correctly decided that contributory negligence as matter of law appeared from the evidence, there seems to be left only the subsidiary question of whether the presence of the train in close proximity to the crossing would have been known to the deceased had he used his senses as he should have done for that purpose. That he was perfectly familiar with the crossing and with the fact that he was about on the time for a train to arrive; that he was driving a gentle horse, not inclined to go fast unless urged to do so; that he was rather above than below the average in intelligence for a boy of his years; and that he ought to have known and did know of the dangers incident to crossing a railroad track, appear so satisfactorily as not to be open to doubt for a moment. He not only must have known, as indicated, independently of any special cautionary admonishment, but he was carefully admonished on the subject, as the evidence shows, before starting out on the particular journey. There are these further unquestionable facts: The railroad track was nearly level

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for a distance of over one third of a mile from the crossing in the direction from which the train was coming. There was ample opportunity to turn from the road at a point eighty-one feet from the crossing when the train must have been in plain sight and hearing. The accident happened in the early morning hours. The headlight of the engine was burning as were the lights in the coaches. It was foggy and misty so as to somewhat obscure the rays of the headlight, but the evidence is all one way that it cast its rays over and upon the highway while the deceased was a considerable distance from the crossing, and that the train was plainly visible from the time he was some over 100 feet therefrom until the fatal event occurred. The physical situation in these regards appears from the evidence beyond any manner of doubt, and the finding as to the speed of the train and the evidence of the speed the deceased was going before reaching a point sixty-six feet from the crossing and thereafter shows that at such point the train could not have been more than about 450 feet from the crossing nor more than about 400 feet from him, and that the view was then, as it had been for some fifty feet or more further back, unobstructed in the direction from which the train was coming for some over 2,000 feet. At the particular point the whole train must have been in full view, the rays of the headlight illuminating the crossing and vicinity thereof. The on-rushing train with the engine bell sounding, so short a distance away, with neither wind nor other material interference with the transmission of sound, must have been, on that still January morning, so conspicuous to the eye and so obvious to the ear that its presence must have been known to the deceased had he paid any attention whatever to the matter. Moreover, it is hard to conceive how he could have well avoided knowing of it. Why did he not stop when the slightest regard for his personal safety and that of his sister demanded it? In view of this picture, by no means overdrawn it is thought, and the

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undisputed and indisputable finding of the jury as to the horse being under control, can there be any other rational solution of the matter than that the unfortunate but reckless boy with his companion challenged the train in a race for the crossing, resulting in the instantaneous passing of the two young and valuable lives beyond the impenetrable veil of eternity? We cannot see any. All the incidents, of which there are many—we have not related them all,—confirm it and none throw doubt upon it. The location of the dead boy and girl, and of the cutter and harness and the condition of each immediately after the lamentable event, show that the horse must have reached the near rail at about the instant the front of the engine passed. The fact that a neighbor who passed over the crossing shortly before the deceased reached it, speeded up his horse to get seasonably across, showing that haste on his part was supposed to be required to get safely over, and indications that as he speeded his horse the deceased did likewise, but by reason of difference in the character of their horses and conveyances the deceased could not make the time of the one ahead, these and other things that might be referred to, lead irresistibly to the conclusion we have reached.

In view of the foregoing stated principles, undisputed evidence, and findings it needs no further discussion to demonstrate that the trial court's decision must stand. The jury, on the undisputed evidence as to opportunity for the deceased to see and hear the approaching train while he was more than 100 feet from the crossing and throughout the entire course thereafter up to the fatal event, might well have been instructed that if they found as to the third question in the negative to find as to the second in the affirmative.

The result of the submission evidences, in a most striking way, the importance of the special-verdict law, properly applied, in the administration of justice. The jury passed upon the third question, doubtless carefully regardful of all

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the evidence bearing thereon. The effect of the finding in the ultimate was to them in obscurity. When they came to the seventh question they appreciated its importance, and doubtless from the best of motives, as regards right in the abstract, but without apprehending clearly legal principles, which the court endeavored to clearly give them, reached a conclusion, which in view of the answer to the third question and the undisputed evidence is indefensible.

"Pity 'tis 'tis true" that in these cases which take such strong hold of human sympathies, juries sometimes, unconsciously probably, are irresistibly so swung away from the safe legal anchorage that they fail to rise to the level required in the discharge of such onerous and important duties. Hence the great importance of the legal effect of each special finding being, for their protection and the ends of justice as well, obscured from their view as much as practicable.

We have now discussed directly, or incidentally, every important matter on this appeal. Much of the brief of counsel for appellant is taken up in discussing minor questions passed upon by the jury adversely to appellant, in deciding major questions, in regard to which their decision is not challenged. Manifestly, we need not heed what is said in that field.

Complaint is made because the court did not permit appellant to introduce evidence of experiments respecting opportunity for seeing a train coming as the one in question did by a person traveling as the deceased traveled. If that were error it was harmless, since the physical situation beyond room for reasonable controversy was as before indicated. Had the witnesses who were tendered testified out of harmony therewith it could not rightly have produced a different result than the one reached. It is a mistake to suppose that such a situation can be thrown into doubt so as to carry the question to a jury by evidence from the mouths of witnesses. Such evidence is not of sufficient weight to turn the scales even from a perfect balance. With an intelligent jury bent

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upon performing its duty it tends rather to strengthen than to impair the adversary's case. As suggested in effect in *Haetsch v. C. & N. W. R. Co.* 87 Wis. 304, 58 N. W. 393, it would be trifling with justice to permit a jury to find contrary to the evident physical fact, even if the person imperiled were present to testify and he or any number of witnesses impeached it by their words.

The suggestion is made that the defense of contributory negligence in such a case as this was abrogated by ch. 595, Laws of 1907. It is sufficient to say on that subject that the rights of the parties were fixed before passage of that law. They could not in any event be varied by it. Moreover, there is nothing in the enactment indicating a legislative purpose to make it retroactive. The cases cited by counsel at this point do not have any bearing thereon. Counsel fail to distinguish between rights and mere remedies. This belongs to the former. When rights become vested, having certain characteristics, among them a remedial feature essentially forming a part thereof, not a mere remedy, they cannot be changed even as to such feature without impairing the right itself. The remedial element in such a case is inseparable from the right of which it forms a part and so is under constitutional protection as regards property rights. *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, 76 N. W. 359; *Hammel v. Cairnes,* 129 Wis. 125, 107 N. W. 1089. So the conclusion must be that the judgment complained of is right.

The loss to the surviving relatives by the untimely death of appellant's intestate and his sister and the still greater loss to the public by the destruction of the two young lives must be charged up to offerings on the altar of our modern conditions with its peculiar dangers, its duties, its responsibilities, and its infirmities. Rules of law cannot be changed by the court and adapted to the exigencies of particular cases however distressing they may be. With indifference to results,

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except as seriousness thereof may stimulate greater care, established principles must be applied as the infallible test of what is right and what is wrong in the legal aspect. Whether the law as we find it is as we would have it to be if we were permitted to make it, instead of being mere instrumentalities to apply it, is immaterial. Our responsibility begins when we are invoked for its application. It ends when we apply it as we find it. The grade of fidelity with which that duty is performed is to be measured by the vigor and courage with which we labor in our own special field, leaving the responsibility for changing the law to the department of government in which the constitution has lodged it. This is said in passing without purpose to suggest doubt as to whether what is, as regards the law, is right, so far as practicable, from the standpoint of right in the abstract.

By the Court.—The judgment is affirmed.

BRAUN, Plaintiff in error, vs. CAMPBELL, Defendant in error.

December 17, 1908—January 5, 1909.

Supervisory power of circuit courts: Correction of justice's docket: Mandamus: *Admission of allegations of petition by motion to quash: Functions of writ: Other adequate remedy: Sufficiency of petition.*

1. If a justice of the peace makes incorrect entries in his docket, the circuit court, in the exercise of its supervisory control, has the power by *mandamus* to compel him to make the true entries according to the real facts.
2. On *mandamus* to compel a justice of the peace to correct the entries in his docket the petition stated, among other things, that such docket falsely recited that a case against petitioner was called at 9 o'clock, the hour to which the case had been adjourned, that the justice and plaintiff's counsel then appeared, and that defendant appeared but offered no evidence, whereas in fact the justice and plaintiff's attorney failed to appear during petitioner's presence at the office of the justice from 9 o'clock to 10:20 o'clock. *Held*, that the allegations of the

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petition stood admitted by a motion to quash the writ for the reason that the facts stated were not sufficient to entitle petitioner to relief, and it was therefore error to quash the writ on the ground that the docket entries imported verity and could not be contradicted and corrected in such proceeding.

3. A writ of *mandamus* cannot be employed to perform the functions of appeal or writ of error.

4. A writ of *mandamus* will not be awarded for relief from the action of inferior courts, unless it be clearly shown that such a court has violated a plain duty, that such violation of duty has produced a substantial injury to the petitioner for which he has no other adequate remedy in the law, and that he will be subjected to an injustice in the law unless such relief is awarded.

5. On *mandamus* to correct the docket entries of a justice of the peace, the facts stated in the petition did not clearly inform the court that the petitioner was not indebted for the amount of the judgment, exclusive of costs and disbursements, to the parties shown by such docket entries to have recovered judgment. It was alleged, as grounds of incorrectness of the docket entries, that petitioner appeared at the office of the justice at the hour to which the case had been adjourned and set for trial, that he remained there for one hour and twenty minutes, and that neither the justice nor plaintiff's attorney appeared during that time to proceed with the case. *Held:*

(1) The loss of jurisdiction by the justice depending upon the certainty with which the time of day was observed and involving a variation of twenty minutes, such slight difference in time could not be received as a clear and certain fact, in the light of common knowledge respecting the liability of mistake in observing the time of day.

(2) The circumstances alleged as tending to show loss of jurisdiction and the falsity of the docket entries, surrounded by such uncertainty, did not present such a clear case of fact as called upon the court to award the extraordinary remedy of *mandamus*.

(3) The uncertainty in the case being coupled with the fact that the amount of pecuniary injury to petitioner may be only the small sum of costs and disbursements in the justice's court, no occasion is presented for the issuance of the writ.

6. The remedy by *mandamus* is a legal one, but is granted only on equitable grounds, when, in the sound discretion of the court, it should be employed to prevent a failure of justice in a matter of a weighty and important nature.

ERROR to review a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

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This is an action for a peremptory writ of *mandamus* to compel the defendant, a justice of the peace, to amend his docket entries, made in a case wherein the petitioner was defendant. It is alleged that the docket entries are false. Petitioner asks that the justice be ordered to correct them so as to state the facts. The entries complained of are as follows:

"August 3rd, 1907. Case called at my office at 9 o'clock a. m. S. M. Marsh appears for the plaintiff. Defendant appears in person but offers no proofs."

It is alleged that at the time the judgment was rendered in the action there was nothing due the plaintiff from the defendant; that petitioner, as defendant in the action, was present at the office of the justice from 9 o'clock, the time to which the case had been adjourned, until 10:20 o'clock; that neither the plaintiff, his attorney, nor the justice appeared during that time; that execution has been issued by the justice upon the judgment rendered; and that the petitioner has no other adequate or efficient remedy for the refusal of the justice to correct his docket. The motion to quash the alternative writ which had been issued was granted by the court on the ground that the petition for the writ did not state facts sufficient to entitle the petitioner to it. This writ of error is brought to review the action of the court in quashing the writ.

George L. Jacques, for the plaintiff in error.

S. M. Marsh, for the defendant in error.

SIEBECKER, J. This is an application by the plaintiff in error for relief against alleged false entries in a justice's docket, which the petitioner claims operate to his injury, and he therefore demands that the justice be compelled to correct them. The power of the circuit court to compel a justice to correct his docket entries so as to make them conform to and correctly represent the actual facts of which they purport to be a record has been upheld by this court. *State ex rel. Marsh v. Whittet,* 61 Wis. 351, 21 N. W. 245; *State*

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ex rel. Green v. Van Ells, 69 Wis. 19, 32 N. W. 32. The *Whittet Case* clearly holds that, if a justice "makes incorrect entries, the circuit court, in the exercise of its supervisory control, has the power by *mandamus* to compel him to make the true entries according to the real facts."

The facts stated in the petition of the plaintiff in error are that the docket falsely states that the case was called at 9 o'clock, the hour to which the case had been adjourned, that the justice and plaintiff's counsel then appeared, and that the defendant appeared but offered no evidence, and avers that in fact the justice and plaintiff's attorney failed to appear during his presence at the office of the justice from 9 o'clock to 10:20 o'clock. The allegations of the petition stand admitted by the motion of defendant in error to quash the writ upon the ground that the facts stated did not show any ground entitling petitioner to relief. The circuit court quashed the writ, holding that, within the decision of the *Van Ells Case,* the docket entries, specifying the hour when the case was called, that plaintiff's counsel then appeared, and that defendant appeared in person but offered no evidence, imported verity, and could not be contradicted and corrected in this proceeding. We find no justification in the *Van Ells Case* for this ruling. In that case the petition and reply to the return alleged that the docket entries failed to record an adjournment which the justice had ordered immediately after receiving the verdict of the jury. These allegations were denied by the return of the justice, and no evidence was adduced to show that the return was incorrect. Upon this state of the record this court held that the return must stand as made, and that on its face it imported verity, since there was no evidence to impeach it.

The case is in harmony with the rule recognized in the *Whittet Case,* that *mandamus* may issue to compel a justice to correct docket entries to accord with the actual facts, if the case presented calls for this extraordinary remedy. In the

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instant case there is no return to the alternative writ, but a motion was made to quash the writ, thus challenging the sufficiency of the petition to entitle petitioner to the relief demanded. The application for the *mandamus* is within the field of the *Whittet Case,* and the question is whether petitioner, upon the facts stated, shows himself entitled to this extraordinary remedy.

It is well established that the writ of *mandamus* will not be employed to perform the functions of appeal or writ of error. Nor will the writ be awarded for relief from the action of inferior courts, unless it be clearly shown that such court violated a plain duty, that this violation of duty has produced a substantial injury to the petitioner for which he has no other adequate remedy in the law, and that he will be subjected to an injustice in the law unless this relief is awarded. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Meggett v. O'Neill,* 104 Wis. 227, 80 N. W. 447; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 234, 82 N. W. 158; *State ex rel. Umbreit v. Helms,* 136 Wis. 432, 118 N. W. 158. The facts stated do not clearly inform us that the plaintiff in error is not now indebted to the parties who recovered the judgment for the amount of the judgment, exclusive of the costs and disbursements. If it is now due there can be no financial liability in addition to the debt, except the costs and disbursements in justice's court.

The plaintiff in error also asserts that he appeared at the office of the justice at the hour to which the case had been adjourned and set for trial, that he remained there for one hour and twenty minutes, and that neither the justice nor plaintiff's attorney appeared during that time to proceed with the case. It appears that plaintiff in error rests his claim on the alleged facts that there was no appearance by the plaintiff, and that the justice was not present within the hour from the time the case was set for a hearing, nor within the twenty

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minutes after the expiration of the hour, during which time he was present. Under the circumstances petitioner's claim to relief depends on the correctness of his claim as to the hour he appeared at the office of the justice. The loss of jurisdiction by the justice depends on the certainty with which the time of day was observed and involves a variation of twenty minutes. We do not deem this slight difference in time, so asserted by plaintiff in error, can be received as a clear and certain fact, in the light of common knowledge respecting the liability of mistake in observing the time of day. The circumstances alleged in the petition as tending to show loss of jurisdiction and the falsity of the docket entries are surrounded by these uncertainties and do not present such a clear case of fact as called upon the court to award this extraordinary remedy.

Coupling this uncertainty in the case with the fact that the amount of the pecuniary injury to petitioner may be only the small sum of costs and disbursements in the justice's court, we are led to the conclusion that no occasion was presented for the issuance of the writ. The remedy is a legal one, but is granted only on equitable grounds, when, in the sound discretion of the court, it should be employed to prevent a failure of justice in a matter of a weighty and important nature. *State ex rel. Umbreit v. Helms, supra,* and cases cited in the opinion.

We are of opinion that the trial court properly denied the writ.

By the Court.—Judgment affirmed.

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SAUERHERING, Respondent, vs. RUEPING and another, Appellants.

December 18, 1908—January 5, 1909.

Insurance: Mutual companies: Authority of officers to sell business: Illegal contracts: Contracts to induce breach of official trust: Legality of object: Effect: Parties in pari delicto: *Relief: Executed contract: Part performance.*

1. The officers of a mutual indemnity insurance company organized under the laws of Wisconsin, without capital stock, and authorized to do business on the assessment plan, cannot sell any interest therein.
2. Under the statutes of Wisconsin a change of location of a mutual indemnity insurance company can be made only by a vote of at least one half of the members of the company at a meeting regularly called. In pursuance of an alleged agreement whereby plaintiff expected to secure by purchase from defendants, who were officers and directors thereof, claims against a mutual indemnity insurance company organized without capital stock and authorized to do business on the assessment plan, the right to manipulate the company in his own interest by getting control of the directors and officers to be secured by the removal of some and the election of others of his own choosing, and to thereby secure the removal of such company to the plaintiff's city, the resignations of one defendant and a sufficient number of directors were tendered and accepted, and the management and control of the company by such and other manipulations was turned over, or attempted to be turned over, to the plaintiff, the purchase of control being the main object. *Held*, that such agreement was illegal and contrary to public policy and good morals.
3. Such contract, if binding, bound the defendants to secure the removal of location of the company, regardless of whether such removal was for the interest of the members or not, and was in conflict with the duty which the defendants owed to the members of the company, who were entitled to the exercise of the judgment and discretion vested in defendants as its officers.
4. Defendants' influence as officers and members of such mutual indemnity insurance company was not the subject of barter or sale, and the agreement to exercise such influence was illegal.
5. In such case, it appearing that plaintiff was in possession of all the facts, and knew the company was a mutual assessment com-

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pany and without capital stock, plaintiff and defendants were *in pari delicto*, and the law therefore should not afford plaintiff relief.

6. In such case, where the alleged contract was performed, in part at least, on both sides, neither party is entitled to relief.

BARNES and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This action was brought to recover $3,000. The complaint charges that on the 29th day of November, 1905, plaintiff and defendants entered into an agreement by the terms of which defendants sold to plaintiff a one-half interest in the Wisconsin Health & Accident Company, a corporation of the city of Fond du Lac, and agreed to change the principal office of said company from Fond du Lac to Wausau, Wisconsin; that plaintiff was to pay for such interest $3,000—$2,000 in cash and $1,000 in a promissory note payable in ten days, which note was executed and delivered and the $2,000 paid. It was further alleged that said corporation was a mutual company organized under the laws of Wisconsin and authorized to do business upon the assessment plan and had no capital stock, and that defendants were president and vice-president, respectively, of said company; that the agreement was void for the reason that defendants were not the owners of the company and had no interest therein which they could sell to plaintiff, and that there was no consideration for the agreement; that shortly after the transaction plaintiff discovered that defendants had no interest and no right to convey any interest in said corporation and demanded return of his money. The defendants denied that any agreement was made on the 29th day of November, 1905, and denied the terms of the agreement as alleged in the complaint, but set up that an agreement was made on the 6th day of January, 1906, the true intent and meaning of which was that defendants agreed to and did convey to the plaintiff an

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interest in certain claims and indebtedness which defendants owned against the Wisconsin Health & Accident Company for moneys advanced to said company and coming from it for services rendered and otherwise, and that defendants further agreed to assist in procuring the resignation of directors of said corporation and the appointment of others in their stead, and to assist in the removal of the principal office of said company from the city of Fond du Lac to the city of Wausau, and to permit the plaintiff to attach to policies of insurance thereafter to be issued and theretofore issued a stipulation to the effect that the assured might assign to St. Mary's Hospital, at Wausau, any liabilities or moneys that might be owing to said assured by reason of policies of insurance, the same being for the benefit of plaintiff, he being at the time a practicing physician, in consideration whereof plaintiff agreed to pay said $3,000. The answer specifically denies that defendants represented or agreed that they would sell a one-half interest in said company, except as in the manner set up in their answer. The defendants set up a counterclaim demanding judgment on the $1,000 note and that the complaint be dismissed. Plaintiff replied to the counterclaim, admitting the execution of the note and denying the other material allegations thereof, and setting up affirmative matter charging want of consideration. The jury returned the following verdict:

"(1) Did the parties agree on November 29, 1905, that the defendants sold and would transfer a half interest in the Wisconsin Health & Accident Company to the plaintiff and to effect a removal of the principal office of said company to Wausau in consideration for the $2,000 paid by the plaintiff to the defendants? *A.* Yes.

"(2) Did the parties agree on January 6, 1906, that in consideration of the payment by the plaintiff of $2,000, and the further payment by him of $1,000 as evidenced by his note to the defendants, that the defendants transferred to the plaintiff their claims against said company for money

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advanced and services rendered by them to said company, and would assist in effecting a removal of the principal office of said company to Wausau? *A.* No."

Plaintiff moved for judgment upon the verdict, and the defendants moved that the answers in the verdict be changed and for judgment notwithstanding the verdict and for a new trial. The several motions of defendants were denied and the counterclaim dismissed, and the motion of the plaintiff granted and judgment rendered in his favor for the sum of $2,196, together with $90.92 costs, from which judgment this appeal was taken.

For the appellants there were briefs by *Doyle & Hardgrove,* and oral argument by *J. G. Hardgrove.*

For the respondent there was a brief by *Brown, Pradt, Genrich & Anderson,* attorneys, and *W. H. Mylrea,* of counsel, and oral argument by *F. W. Genrich.*

KERWIN, J. The jury found that the parties agreed November 29, 1905, that the defendants would sell and transfer a half interest in the Wisconsin Health & Accident Company to the plaintiff and effect the removal of the principal office of such company to Wausau, Wisconsin, in consideration of $2,000 paid by plaintiff to defendants. The evidence shows without substantial dispute that the defendants agreed to transfer their claims against the company for services performed and money expended in the organization of the company, and that they would also secure the removal of the principal office of such company from Fond du Lac to Wausau, Wisconsin, and make certain changes in the officers of such company by procuring the resignation of directors and the election of others in their stead; that this scheme was carried out to the extent of causing four directors to resign and the election, or attempted election, of four others named by the plaintiff in their respective places; that the general management of the company was turned over to the plaintiff,

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whose place of business was Wausau, Wisconsin, he being a practicing physician there and desirous of operating said Wisconsin Health & Accident Company in connection with his hospital work at Wausau and for his own personal interest; that he advertised the company at Wausau, Wisconsin, and manipulated it in his own interest from the time of the agreement, November 29, 1905, down to about the time of the commencement of this action, a period of more than two months. It is further established by the evidence that on January 6, 1906, the parties met in furtherance of the scheme, and the plaintiff, in addition to the $2,000 paid November 29, 1905, executed and delivered to the defendants his promissory note for $1,000 payable in ten days from date as part consideration on his part for an interest in or control of the company and transfer of the principal office to Wausau. This note was not paid when it became due, the plaintiff claiming that the defendants had not promptly complied with their contract in the removal of directors and election of others and change of the principal office in accordance with the agreement, and the defendants claiming that the plaintiff was at fault in not paying the note when it fell due.

The Wisconsin Health & Accident Company was a mutual indemnity insurance company organized under the laws of Wisconsin, without capital stock, and authorized to do business on the assessment plan. The defendants, therefore, could not sell a half interest or any interest therein, which was well known to the plaintiff when the agreement of November 29, 1905, was made, and particularly when the note was given, January 6, 1906. No claim is made that any fraud or deception was used by the defendants, but, on the contrary, the plaintiff was given access to the books, records, and business of the company and fully examined them.

The evidence further establishes that at the time the agreement was made the defendants had expended considerable money and performed services in the organization of the

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company, and had become liable at the bank by indorsements for money thus expended, and were desirous of being relieved from such liability and disposing of their claims against the company. So it appears from the evidence that the interest which plaintiff expected to get by the purchase was the defendants' claims against the company and the right to manipulate the company in his own interest by getting control of the directors and officers by the removal of some and the election of others of his own choosing, and thus secure the change of the principal office to Wausau, Wisconsin. It was talked at the time the agreement was made that the best way to control the company was to keep it indebted to the party who desired the control. The purchase of control was the main object, and this was to be accomplished through purchase of claims, change of officers, and vote to move the location of the principal office to Wausau. The defendant *Rueping* was president and defendant *Schmidt* vice-president.

Under the statutes the change of location could be made only by a vote of at least one half of the members of the company at a meeting regularly called. In pursuance of the alleged agreement the resignations of the defendant *Schmidt* and four directors were tendered and accepted, and the management and control of the company by such and other manipulations turned over, or attempted to be turned over, to plaintiff. Such an agreement, upon well-established principles, is illegal and contrary to public policy and good morals. The defendants could not use their position of trust and confidence as officers of the company to forward their own private interest or the interest of plaintiff. *Forbes v. McDonald*, 54 Cal. 98; *Meacham v. Dow*, 32 Vt. 721. If the contract were binding the defendants would be bound as officers of the company to secure its removal to Wausau, regardless of whether such removal was for the interest of the members or not. It is manifest that such an agreement is illegal and in

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conflict with the duty which the defendants owed to the members of the company, who were entitled to the judgment and discretion vested in the defendants as officers. Any agreement which might in any manner hamper or interfere with the free exercise of such discretion is illegal. *Jackson v. Bowman,* 39 Miss. 671. The defendants had nothing which was the subject of sale, except, perhaps, their claims for services and money expended in the company's behalf. But the defendants' influence as officers and members in securing the removal of the location of the principal office to Wausau was what the plaintiff wanted. This was not the subject of barter or sale, and the agreement to exercise such influence was illegal. The agreement placed the defendants in a position where their duties as officers were, or might be, antagonistic to their duties to plaintiff under the contract; hence the contract was void. Greenhood, Public Policy, 292, 293, 294; *Bliss v. Matteson,* 45 N. Y. 22. The agreement involved illegality from the nature of the transaction and was therefore *contra bonos mores.* Greenhood, Public Policy, 338, 336, 337, 306, 156; *Waldo v. Martin,* 4 B. & C. 319; *Noel v. Drake,* 28 Kan. 265; *Parsons v. Thompson,* 1 H. Blackst. 322; *Morse v. Ryan,* 26 Wis. 356. It is clear from the foregoing cases and many others which may be found that the alleged agreement entered into between the plaintiff and defendants was illegal, contrary to the principles of public policy, and should not be enforced, nor should the court relieve the parties from the consequences of their illegal acts.

It is insisted, however, as a basis of recovery on the part of the plaintiff that the parties were not *in pari delicto.* This contention cannot be sustained under the evidence. The plaintiff was in possession of all the facts, knew the company was a mutual assessment company without capital stock, and had knowledge of all the facts which rendered the agreement illegal. Under such circumstances the law will not afford him relief. 9 Cyc. 546, 548; *Miller v. Larson,* 19 Wis.

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463; *Melchoir v. McCarty,* 31 Wis. 252; *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492; *Cohn v. Heimbauch,* 86 Wis. 176, 56 N. W. 638. It is claimed, however, by plaintiff that recovery should be had on the principle of right of rescission and recovery of the money paid where the contract remains executory; but the difficulty with that argument is that in the case before us the alleged contract was performed, in part at least, on both sides, and where there is part performance the court will not lend its aid to either party. *Miller v. Larson, supra.* It follows that neither party is entitled to recovery; the plaintiff cannot recover the $2,000 paid, nor the defendants on the $1,000 set up in the counterclaim.

By the Court.—The judgment of the court below is reversed, and the action remanded with directions to enter judgment dismissing the complaint and counterclaim.

BARNES, J. (*dissenting*). The real contention on the trial of the case was whether Exhibit 1 expressed the contract between the parties as claimed by the plaintiff, or whether the transaction of January 6th, including the execution of Exhibit 2, expressed such contract as claimed by the defendants. On disputed evidence the jury found in favor of the plaintiff, and upon such finding he was entitled to judgment, unless the contract expressed in Exhibit 1 was in contravention of public policy, or unless his testimony was so inherently incredible as to be unworthy of belief. It is improbable that the plaintiff did not know that a mutual insurance company was not subject to barter and sale, but it is not incredible that he should have been innocent upon the subject. Many people who are intelligent along the lines of their respective callings have very hazy ideas about the fundamental differences between mutual and stock companies. It is likewise improbable that plaintiff was not aware of the fact that the insurance company he was purchasing an interest in was not organized as a stock company, but it is not incredible that he

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should be innocent upon the point. The case was tried by a jury at the home of the defendants, and I think its verdict should stand.

There was no purpose on the part of the buyer or sellers that the company should be looted or that the policy-holders should suffer by the transaction, and there is not a suggestion of any kind in the case that they would suffer. The plaintiff suggested the lowering of the rates then charged and additional hospital facilities for policy-holders. He also proposed to make a vigorous endeavor to augment the membership which should reduce the expense ratio per policy-holder of conducting the business. There is no suggestion that the business of the company would suffer by removing the offices of the company to Wausau. I should deprecate as quickly as any one any attempt to exploit a mutual insurance company for the illicit gain of its trustees and officers. I do not think agreements should be avoided as against public policy, however, where theoretical pangs only are alleviated by so doing. Under the great weight of authority the transaction must at least have a tendency to be injurious to the public before the ban of the law operates upon it. 6 Words & Phrases, 5813; 23 Am. & Eng. Ency. of Law (2d ed.) 455, 456, and cases cited.

MARSHALL, J. I concur in the opinion of Mr. Justice BARNES.

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BILLINGTON, Appellant, vs. EASTERN WISCONSIN RAILWAY & LIGHT COMPANY, Respondent.

December 18, 1908—January 5, 1909.

Appeal and error: Review of intermediate order: Judgment roll: Exceptions: Affirmance and reversal: Electricity: Personal injuries: Contributory negligence.

1. An order for judgment on a special verdict is properly part of the judgment roll and therefore no exception is necessary to procure its review.
2. A written direction changing the answer to a question of the special verdict incorporated into the order for judgment upon that verdict is within the class of orders mentioned in sec. 3070, Stats. 1898 (involving the merits and necessarily affecting the judgment, and appearing upon the record transmitted on appeal), and may be reviewed in the supreme court in the absence of exception thereto.
3. Although the bill of exceptions was not certified to contain all the evidence, the supreme court in this case examined it sufficiently to ascertain whether there might not be such clear evidence returned contrary to the decision below as to make it proper to send back the record for correction by proper certificate to the bill of exceptions.
4. Where, in an action for personal injuries, it appeared without dispute that plaintiff, twenty-five years of age, knew he was taking hold of a live electric wire heavily charged, had before him actual demonstration of its condition, and yet intentionally and unnecessarily but from good motives grasped the wire, assuming, without real knowledge, to know that he would be protected by the insulating cover upon the wire, the supreme court is not prepared to say that the trial court erred in inferring from such evidence, stated most favorably to the plaintiff, that he was guilty of a slight want of ordinary care which contributed to his injury.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment in an action for damages to the person caused by the alleged negligence of the defendant.

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For the appellant there was a brief by *Morse & Williams,* and oral argument by *R. L. Morse.*

Among other references upon the part of the appellant were the following: *Zentner v. Oshkosh G. L. Co.* 126 Wis. 196, 105 N. W. 911; 51 Cent. Law Jour. 449; *Revolinski v. Adams C. Co.* 118 Wis. 324, 95 N. W. 122; *Grant v. Keystone L. Co.* 119 Wis. 229, 96 N. W. 535; Shearman & Redf. Neg. § 87.

For the respondent there was a brief by *Doyle & Hardgrove,* of counsel, and oral argument by *T. L. Doyle.*

Among other references upon the part of the respondent were *Wunderlich v. Palatine Ins. Co.* 104 Wis. 382, 80 N. W. 471; Keasbey, Elec. Wires, § 256; 15 Cyc. 476; 7 Current Law, 1264; *Randall v. N. W. Tel. Co.* 54 Wis. 140, 11 N. W. 419.

TIMLIN, J. The jury rendered a special verdict finding the negligence of the defendant and consequent damage to the plaintiff in the sum of $3,000. Among the questions of the special verdict was one numbered 6, which inquired whether there was any want of ordinary care on the part of the plaintiff which contributed to produce his injury. This the jury answered "No." Upon motion of the defendant the circuit court set aside this answer and answered the question in the affirmative and ordered judgment for defendant. There was no exception taken to this ruling of the court. The order for judgment on the special verdict is properly part of the judgment roll and therefore no exception is necessary to review such order. Sec. 2872, Stats. (1898). Upon appeal from a judgment this court is authorized to review any intermediate order or determination of the court below which involves the merits or necessarily affects the judgment and which appears upon the record transmitted, whether the same be excepted to or not. Sec. 3070, Stats. (1898); *Morris v. Nat. P. Soc.* 106 Wis. 92, 81 N. W. 1036; *Jones v.*

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Broadway R. R. Co. 136 Wis. 595, 118 N. W. 170. A written direction changing the answer to a question of the special verdict incorporated into the order for judgment upon that verdict is within the class of orders above described which are reviewed in this court in the absence of exception thereto. In this respect the case differs from *Shannon v. Dorsinski,* 134 Wis. 68, 114 N. W. 129. But in the instant case there is also no statement in the bill of exceptions or in the certificate appended that the bill contains all the evidence. The nature of the question determined by the circuit court in changing the answer of the jury to the sixth jury finding necessitates an examination into all the evidence bearing upon the contributory negligence of the plaintiff. We have nevertheless looked into the evidence returned sufficiently to ascertain whether there might not be such clear evidence returned contrary to the decision below as to make it proper for us to send back the record for correction by proper certificate to the bill of exceptions. We have come to the conclusion, the writer with considerable doubt, that there is no such evidence.

It appears that the plaintiff is a man about twenty-five years of age, and that on July 4, 1905, while sitting in a public park, he saw some boys playing with a broken electric light wire by placing sticks on the exposed end of the copper wire where the latter was stripped of its insulating covering. He walked over to where they were, saw that the wire was emitting sparks, and that it burned the sticks pressed against it. It was very apparent, and the plaintiff knew, that this was a broken electric light wire and at the time charged with a heavy current of electricity. Without saying anything to the boys who were playing with the wire, and after waiting and apparently watching their antics for about half a minute, he stooped down and took hold of this wire with his left hand at a place where it was coated with insulating material, and some two feet from the exposed and sparking end, for

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the purpose of throwing it over the branch of a nearby tree and thus saving the surrounding youngsters from possible injury by contact with the wire. He thought he could safely do this, but he was severely shocked and also had his left hand badly burned.

The distinctive feature of this case is that the plaintiff knew he was taking hold of a live wire heavily charged, had before him actual demonstration of its condition, and yet intentionally and unnecessarily but from good motives grasped the wire assuming, without any real knowledge, to know that he would be protected by the insulating cover upon the wire. The circuit court may have inferred from this evidence, above stated most favorably to the plaintiff, that the plaintiff was guilty of a slight want of ordinary care which contributed to his injury, and this court is not prepared to say the court below erred in so ruling.

By the Court.—Judgment affirmed.

WILLMER, Respondent, vs. GOEBEL, Appellant.

December 18, 1908—January 5, 1909.

Municipal corporations: Defects in sidewalks: Liability of abutting owner: General city charter: Adoption of subchapter: Repeal of provisions of special charter.

The charter of the city of Fond du Lac (sec. 1, subch. 18, ch. 152, Laws of 1883) makes it the duty of abutting owners to keep in repair sidewalks in front of their premises, and then imposes a liability for failure to comply with that duty. The common council of that city, by ordinance, adopted subch. XIX, ch. 40*a* (secs. 925—201 to 925—207), Stats. (1898), pertaining to sidewalks, "in lieu of the provisions now existing upon said subject in the special charter governing said city." Under the provisions of sec. 926, Stats. (1898), a city desiring to adopt a portion of the general charter law may adopt any section or chap-

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ter thereof "in addition to or in lieu of" the provisions of its special charter. *Held* that, by reason of the passage of such ordinance, sec. 1, subch. 18, of the special charter of the city of Fond du Lac was repealed, and that after such repeal no right of action could arise in favor of an injured party against a property owner by reason of a defect in a sidewalk abutting on his premises.

APPEAL from an order of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The appeal is from an order overruling a general demurrer to the complaint. The action is brought to recover damages from the defendant by reason of an injury sustained on account of an alleged defective sidewalk which it was the duty of the defendant to keep in a proper state of repair. The plaintiff relies upon the provisions of the special charter of the city of Fond du Lac for authority to maintain the action against the defendant as abutting owner. If the provisions of such special charter are still in force, it is conceded that the action is properly brought against the defendant. It is the contention of the defendant that the city of Fond du Lac, after adopting certain portions of the general charter law relating to sidewalks, repealed that portion of the special charter of the city upon which plaintiff relies to maintain her action.

For the appellant there was a brief by *Doyle & Hardgrove,* and oral argument by *T. L. Doyle.*

For the respondent there was a brief by *Morse & Williams,* and oral argument by *R. L. Morse.*

BARNES, J. By ch. 152, Laws of 1883, the charter of the city of Fond du Lac was revised. It was subsequently amended in various particulars, but such amendments do not affect this case except in one particular, which will be referred to later. Such charter contained provisions empowering the common council of the city to order sidewalks to be laid, repaired, and relaid upon such streets as it deemed necessary at the expense of abutting owners, and, in the event

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of the failure of such owners themselves to make such improvements within a stated period after they were notified so to do, the city was authorized to do the work and charge the expense against the abutting property by way of a special tax. With one exception, practically all of the important provisions of the charter relating to sidewalks are contained in subch. 11 of said ch. 152. The exception referred to is sec. 1, subch. 18, of the charter, and reads as follows:

"Every corporation, association, or society, owning, and each and every owner of any lot, part of lot, or parcel of land, in said city, upon, along, in front of, or adjoining which there shall have been or shall hereafter be placed, constructed, or laid, any walk, or sidewalk, for the use or accommodation of the public to walk upon, shall at all times keep and maintain said walk, or cause the same to be kept and maintained in a safe, convenient and effective condition, for the use of any person or persons desirous to walk thereon; and any person who may have been or shall hereafter be injured by reason of the unsafe or defective condition of such walk or sidewalk, shall have the right to maintain an action in any court of record against such owner or owners, for all damages or injury of every nature, resulting to such person or persons by reason of the neglect of such owner to maintain, or caused or cause to be maintained, such walk or sidewalk in a safe, convenient and effective condition; provided, that no action shall be maintained against such owner, unless the same be commenced within one year from the time such injury shall have happened to the person so claiming such damages."

The requirement of this section that abutting owners should keep the sidewalks adjacent to their property in an efficient state of repair, and that they should be primarily liable for any injury occasioned by failure so to do, is too plain to admit of doubt or equivocation. *Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913. Sec. 926, Stats. (1898), provides that any city operating under a special charter

"may adopt the provisions of any subchapter, section or subdivision of any section of ch. 40*a* [general charter law], and may exercise any power or franchise thereby conferred upon

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cities organized under said chapter, in addition to or in lieu of the provisions of its special charter and the powers and franchises therein specified, by an ordinance adopted for that purpose, . . . and when adopted as herein prescribed such ordinance shall operate to that extent as an amendment of such charter."

In *Hay v. Baraboo,* 127 Wis. 1, 17, 105 N. W. 654, 660, this court held that "the necessary effect of adopting a part of the general charter by a city existing under a special charter is to place such city *pro tanto* under the general law as the same may be from time to time changed."

By its ordinance published July 11, 1904, the city of Fond du Lac adopted a portion of the general charter law. By sec. 1 of the ordinance, secs. 925—172 to 925—200 were adopted in lieu of the then existing provisions of the special charter on the subject of city improvements. By sec. 2 of such ordinance, subch. XIX, ch. 40*a* (secs. 925—201 to 925—207), pertaining to sidewalks, and all acts amendatory thereof, were "adopted in lieu of the provisions now existing upon said subject in the special charter governing said city." Secs. 925—201 to 925—207 contain a complete scheme for the building and repairing of sidewalks. The width, the grade, and the construction material may be prescribed by the proper city officers. It is made the duty of the abutting owner to build or rebuild the walk adjacent to his property at his own expense when ordered so to do by the city authorities. In the event of his failure or refusal to comply, the city is authorized to construct the walk and the expense thereof is chargeable against the abutting property. Secs. 925—201 to 925—207, aforesaid, were originally defective in not imposing any duty upon the lotowner to make such repairs as did not render necessary the construction of an entirely new walk and in not empowering the board of public works to make the repair until after the lapse of more than ten days from the time the walk became defective. To supply an apparent omission from the law in this regard,

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sec. 925—205 was amended by ch. 173, Laws of 1899, and by ch. 159, Laws of 1905, and again by sec. 2, ch. 674, Laws of 1907. The law of 1907 did not become effective until after the occurrence of the injury complained of, but for the purposes of this case the amendment of 1907 is not material. The amendment of 1905 provided that "in all cases where the sidewalk shall be out of repair, should such portion thereof be in such condition that the board of public works do not deem it necessary to order the removal of the whole thereof, it shall be the duty of the board of public works to repair the same."

The principal difference between the provisions of the special charter of the city of Fond du Lac pertaining to sidewalks and those contained in the general charter law, which were adopted by the city, in so far as the same are material in this case, would seem to be that under the special charter the lotowner was charged with the duty to keep and maintain the sidewalk adjacent to his property at all times in a safe, convenient, and effective condition, and was made primarily liable to persons suffering injury by reason of his failure to comply with such requirements, while the general charter imposed upon the lotowner the burden of building a sidewalk in the first instance, or rebuilding such walk when it became necessary and he was ordered by the proper authorities so to do, but imposed upon the city the duty of making needed repairs where a part only of the walk was defective, and no liability was imposed upon the property owner for damages resulting from his failure to build, rebuild, or repair his sidewalk.

It will be observed that under the provisions of sec. 926, heretofore quoted, a city desiring to adopt a portion of the general charter law might adopt any section or chapter of the same "in addition to or in lieu of" the provisions of its special charter. The city of Fond du Lac adopted the provisions of the general charter law relating to sidewalks "in lieu" of the

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provisions of its special charter existing upon the subject, and not "in addition" thereto. Certainly sec. 1 of subch. 18 of the special charter of the city contained a provision upon the subject of sidewalks, and there would seem to be no escape from the conclusion that at least so much of said sec. 1 as imposed upon the lotowner the duty of keeping the sidewalk adjacent to his property at all times in a convenient and effective condition has been superseded and repealed by the adoption of the provisions of the general charter law upon the subject. The only doubtful question is whether the portion of said sec. 1 pertaining to the liability of the abutting owner remains after the part prescribing the duty of the lotowner in reference to sidewalks is eliminated.

Said sec. 1 is a consistent act taken in its entirety. It first prescribes a duty and then imposes a liability for failure to comply with the duty. The duty prescribed by that section is not the duty prescribed by the general charter law in at least two particulars. In the event of a part only of the sidewalk becoming defective, as when a plank is broken in a walk that is otherwise in good condition, under the general charter law the duty of making the repair seems to be lodged with the city and not with the abutting owner. Neither, under such charter, is there any duty imposed upon the abutting owner to build an entirely new walk, no matter how defective the old one has become, until he is ordered so to do by the city. If the liability proviso of the special charter still exists, then the abutting owner may be held liable for the negligence of the city in failing to perform a duty which the law commands it to perform. Such owner may also be held liable for an injury which is not the result of his negligence, in that no legal duty is imposed upon him to make certain repairs, or even to rebuild his walk, in the absence of a direction from the city council.

The section of the special charter referred to is so punctuated that it makes but one complete sentence. The liability

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portion of it seems to be reasonably dependent upon the part which imposes the duty to keep in repair. It would be a forced construction to hold that one part has been repealed and the other retained. It is doubtful if the liability part of the statute would have been enacted in the absence of the part thereof creating and defining the duty. The entire section is certainly a provision of the special charter of the city of Fond du Lac existing upon the subject of sidewalks.

When the provisions of the general charter law relating to sidewalks are adopted in lieu of the provisions of the special charter on such subject (and one of the provisions of the special charter makes the abutting owner liable for injuries sustained by reason of a defect in a sidewalk adjacent to his property), it seems logical enough to say that the statute creating the liability is a provision relating to sidewalks. Sec. 1 of subch. 18 of the special charter in its entirety, and the two component parts thereof, come fairly within the express terms of the ordinance which adopts the provisions of the general charter law on the subject of sidewalks in lieu of the provisions contained in the special charter on such subject. The conclusion follows that, by reason of the passage of the ordinance referred to, sec. 1 of subch. 18 of the special charter of the city of Fond du Lac was repealed, and that after such repeal no right of action could arise in favor of an injured party against a property owner by reason of such a defect in a sidewalk as is alleged in the complaint herein.

By the Court.—The order of the circuit court is reversed, and the cause is remanded with directions to sustain the demurrer to the complaint.

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MILLER, Respondent, vs. NEALE and another, Appellants.

December 18, 1908—January 5, 1909.

Fires: Negligence: Trial: Questions for jury: Usage and custom: Appeal and error: Harmless error: Evidence: Competency: Res gestæ: *Examination of witnesses: Cross-examination: Requests for instructions to jury: Damage to standing timber: Measure of damages.*

1. A man may lawfully burn rubbish or brush upon his own land if he exercises that prudence in the starting of the fire and the management thereof after it has started which the rules of ordinary care demand.
2. A man starting a fire on his own land is using a dangerous agent, and when there is much inflammable material on the ground, and the wind is strong in the direction of his neighbors' lands, he may be charged with negligence if he sets a fire, or if, having set it, he does not exercise that care to keep it under control which ordinary prudence dictates.
3. In an action to recover damages resulting to the plaintiff's standing timber by reason of a fire alleged to have been negligently set on the defendants' land by their servant and which escaped from control and spread upon plaintiff's land, the evidence, stated in the opinion, is *held* sufficient to entitle the jury to find that there was negligence both in starting the fire and in taking care of it after it was started.
4. In such case the evidence on the question of contributory negligence on the part of the plaintiff is *held* to have presented a question for the jury.
5. In an action to recover damages resulting to plaintiff's standing timber by reason of a fire alleged to have been negligently set on defendants' land, plaintiff, on cross-examination, admitted that there was a custom at an early day to burn over both pasture and timber land, but directly denied the existence of such custom for some years before the fire, where pasture and timber joined, which evidence was stricken out. *Held*, irrespective of the question whether evidence of custom would be competent, that there was no prejudice to defendants in striking out the testimony.
6. In an action to recover damages resulting to plaintiff's standing timber by reason of a fire alleged to have been negligently set on defendants' land by their servant, declarations of the servant made in connection with and throwing light upon his acts in starting the fire are *held* admissible as part of the *res gestæ*.

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7. Where the servant of defendants was called as a witness for the plaintiff, the fact that the servant was afterwards called and fully examined as a witness for defendants, and was not an adverse or unwilling witness, sufficiently cures any alleged error in limiting his cross-examination when called as a witness for the plaintiff.
8. Refusal of requests for instructions to the jury is *held* to be without error, where, so far as they stated correct principles of law applicable to the case, they were included in the charge as given, and those not so included had no substantial evidence on which to base them.
9. In an action to recover damages by fire to standing timber, where the evidence as to damages was not very satisfactory, it is *held* that there was no positive error in rulings on the admission of evidence, nor in instructing the jury that in assessing damages they should be fair and just and fix such sum as would compensate the plaintiff for the injury which the preponderance of the evidence established that he actually sustained solely as the result of defendants' negligence.
10. The true measure of damages when standing timber is destroyed by fire seems to be the diminution in the value of the land caused by the injury to the timber.
11. Where standing timber is destroyed by fire it is not error to admit proof of the damage to the timber itself. While such proof does not determine the measure of the damages, it is entirely legitimate proof and entitled to be considered by the jury in fixing the diminished value of the land.
12. In an action to recover damages for loss to standing timber destroyed by fire, plaintiff's admission that his statement as to the damage to the trees was a mere guess is *held* to mean a rough estimate and not an accurate judgment based on careful measurement, and hence no error was committed in refusing to strike out his testimony on that subject.

APPEAL from a judgment of the circuit court for Marquette county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is an action to recover damages resulting to the plaintiff's standing timber by reason of a fire alleged to have been negligently set on the defendants' land by their servant and which escaped from control and spread onto the plaintiff's land. There was a general verdict for the plaintiff, assessing

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his damages at $125, and from judgment thereon the defendants appeal.

The plaintiff and the defendant *William Neale* own adjoining farms separated by a north and south country highway. The defendant's farm is on the west side of the highway and the plaintiff's on the east, and the plaintiff's wood lot is on the south side of his land adjoining the highway. *Page Neale* is a son of *William,* and was living upon and working *William's* farm at the time of the fire, while *William* lived at some distance, but was at the farm occasionally, and, so far as the evidence shows, was managing the farm with his son. On the morning of the 22d of April, 1905, at about 8 o'clock, one Belcher, who was a hired man employed by the *Neales,* set a fire upon the defendants' land for the purpose of cleaning out some grass and brush preparatory to building a fence between a pasture lot and a wood lot, under general directions from the defendants which had previously been given. There was considerable dry grass and brush on the ground between the starting point of the fire and the plaintiff's land, and there was evidence that a strong northwest wind was blowing, although this latter fact was in dispute. The fire spread eastward and southward and got beyond control. Belcher finally started a back fire near the highway in order to arrest the progress of the original fire, but the attempt was unsuccessful, and the fire crossed the highway about noon and did some damage in the plaintiff's timber, the amount of which was in dispute.

Daniel H. Grady, for the appellants.

D. W. McNamara, for the respondent.

WINSLOW, C. J. A man may lawfully burn rubbish or brush upon his own land if he exercises that prudence in the starting of the fire and the management of it after it is started which the rules of ordinary care demand. He is using a dangerous agent, and when there is much inflammable material on the ground, and the wind is strong in the direction

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of his neighbors' lands, he may well be charged with negligence if he sets a fire, or if, having set it, he does not exercise that care to keep it under control which ordinary prudence dictates. These principles are fundamental, and they form a sufficient answer to the defendants' contention that there was no evidence of negligence and hence that a nonsuit should have been granted. There was sufficient evidence in the present case to entitle the jury to find that there was negligence, both in starting the fire and in taking care of it after it was started.

Many minor errors are assigned, all of which have been examined and the more important of which will be noticed. It is said that the plaintiff was guilty of contributory negligence, as matter of law, because he was working in his own field some eighty rods distant from the starting point of the fire and saw the smoke during the forenoon, but did not go to the place of the fire or offer assistance until about the time when it crossed the highway. This question was clearly one for the jury. The evidence on the subject was not so conclusive as to warrant the court in saying that the rules of ordinary care required him to do more than he did.

Upon the cross-examination of the plaintiff the court permitted the defendants to ask a number of questions concerning the custom of farmers in that locality with reference to burning off grass and brush at that time of year. At a later stage of the case the court struck out the evidence, and this ruling is assigned as error. On examination of the testimony so stricken out we find that, while plaintiff admitted that there was a custom in an early day to burn over both pasture and timber land, he directly denied that there was any such custom at the time of the fire and for some years prior thereto, where, as in this case, pasture and timber joined. Irrespective of the question, therefore, whether evidence of custom would be competent, there was no prejudice to the defendants in the striking out of the testimony.

One of plaintiff's witnesses, named Grosskratz, who was a

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farmer living north and east of the starting point of the fire, testified that he was with Belcher when he started the fire, and that just before starting it Belcher asked him if it would harm his buildings, and he looked at the wind and saw it was coming from the northwest and told Belcher that it would do no harm. This testimony was objected to, and its admission is now assigned as error. Clearly, these remarks were declarations made in connection with and throwing light upon the main fact in controversy, namely, the setting of the fire, and were admissible as part of the *res gestæ*.

Errors are assigned because the plaintiff was allowed to testify that the timber was good timber, also that he was keeping it for his own use, and because the defendants were not permitted to fully cross-examine the man Belcher when called as a witness for the plaintiff. The first two of these assignments of error are trivial in their nature, and the rulings could not be prejudicial, even if it be admitted that they were technically erroneous. As to the alleged improper limiting of the cross-examination of Belcher, it is sufficient to say that he was afterwards called and fully examined as a witness for the defendants, and was not an adverse or unwilling witness, and that the defendants then had full opportunity to examine him upon the subjects as to which they desired to cross-examine him.

A large number of instructions were requested by the defendants, all of which were refused, and these rulings are now assigned as error. We shall not consider the instructions requested in detail. The trial court gave the jury a comprehensive and substantially correct charge, placing before them the legal principles which should govern the deliberations, without repetition and with commendable clearness and brevity. So far as the requested instructions stated correct principles of law applicable to the case they were included in the charge given. A number of these requested instructions touched upon the question of a supposed change in the velocity or direction of the wind during the progress of

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the fire, and upon the legal effect of such change upon the question of defendants' negligence. None of these instructions were given or incorporated in the general charge, for the very sufficient reason that there was no substantial evidence on which to base them. The nearest approach to evidence showing a change, either in the velocity or direction of the wind, was some testimony that the fire worked eastward for a time and then southward; but this might easily result from the nature of the intervening ground and the presence or absence of combustible material in the course of the fire, and there is practically no evidence to show that it resulted from change of wind.

Various exceptions bring up the question whether there was error in the rulings or instructions to the jury on the question of the measure of damages. The plaintiff, after stating the kind of timber in his wood lot and that twelve acres of the timber was entirely killed by the fire and the other eighteen acres blackened, was allowed to answer, against objections, that in his opinion the damage to the timber was about $300. On cross-examination he stated that he did not count the trees, and that his statement of damages was not based on measurement or accurate inspection, but was a guess. Thereupon the defendants moved to strike out plaintiff's answers as to the value of the timber burned, but the motion was overruled. On redirect examination he testified that the land with the timber on it prior to the fire was worth about $35 per acre and after the fire about $20 per acre. One Baker, who was a farmer and a witness called by the plaintiff, testified to an examination of the timber after the fire and that about one third of the trees were dead, and that in his opinion the land was worth $20 to $35 an acre before the fire, and after the fire $10 less an acre. Several witnesses for the defendants testified to an examination of the woods just prior to the trial and that in their opinion the damage to the timber by fire was about $15 in all.

The foregoing constituted all the evidence that was given

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on the subject, and the court charged the jury that in assessing damages they should be fair and just, and fix such sum as would compensate the plaintiff for the injury which the preponderance of the evidence established that he actually sustained, solely as a result of the defendants' negligence. No definite rule as to the mode of ascertaining the damage was given by the court or requested by either party. While the evidence was not very satisfactory on the subject, and the charge was merely general, we are unable to see that any positive error was committed either in the rulings or in the charge. Doubtless, the true measure of damages was the diminution in the value of the land caused by the injury to the timber (*Nelson v. Churchill,* 117 Wis. 10, 93 N. W. 799), and doubtless, also, the trial court would have given a definite instruction to this effect had it been requested; but it was not, and it certainly was not error to say that the plaintiff was entitled to recover such sum as would compensate him for the injury sustained which was caused by defendants' negligence. Nor was it error to admit proof of the damage to the timber itself. While such proof does not determine the measure of the damages, it was entirely legitimate proof and entitled to be considered by the jury in fixing the diminished value of the land. *Nelson v. Churchill, supra.* The plaintiff's admission that his statement as to the damage to the trees was a mere guess, evidently meant that it was a rough estimate and not an accurate judgment based upon careful measurement, and hence there was no error in refusing to strike out his evidence on the subject.

By the Court.—Judgment affirmed.

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POLUCKIE, Respondent, vs. WEGENKE, imp., Appellant.

December 18, 1908—January 5, 1909.

Appeal and error: Questions considered: Immaterial matters: Subrogation.

1. On review of a judgment determining appellant's right in lands, if he obtains by the judgment all he is entitled to, it is immaterial as to him to what source his title is referable.
2. Subrogation is based on rules of equity. It is a creation of the law whereby the substantial ends of justice may be accomplished regardless of contract relations.
3. Where a person for the protection of his title to property is compelled to pay off a lien thereon for a debt for which he is not liable, so that another having an interest in the property and who stands prior in obligation to pay the debt, either because of being the debtor or being more immediate to the creator of the lien, will be relieved of the burden, equity immediately operates in favor of the payor, preserving the lien for his protection to the extent that he would otherwise suffer loss to such other's gain.
4. In an equitable action to have a forfeiture declared of rights obtained by P., a grantor of appellant, under a conveyance to the grantor by his parents (the plaintiff and her husband now deceased) to secure their support for the balance of their lives, it is *held* that there was nothing in the transactions between appellant and his grantor, stated in the opinion, upon which right of subrogation could be grounded.
5. Where each party before the trial court was awarded judgment for just what he or she was entitled to, and as between appellant and other parties interested, if there were any such, the situation was unaffected by the judgment, the supreme court affirms the judgment.

APPEAL from a judgment of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Equitable action to have a forfeiture declared of rights obtained by John Poluckie and others through him under a conveyance to him by his parents (plaintiff and her husband now deceased) to secure their support for the balance of their

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lives, the claim being that the deed and contract back for support had been extinguished by breach of condition subsequent.

The consideration for the transfer and the status of the title at the time thereof and subsequent occurrences as to the title are indicated in the findings covering the issues and are in brief as follows:

November 22, 1901, plaintiff's husband owned the premises described in the complaint, subject to a mortgage owned by Gustave Krause. At that time and for a long time prior thereto they occupied such premises as their home. Defendants John and Joseph Poluckie are their sons. On the day named they joined in a conveyance of the property to John, the deed being duly recorded. They took a contract back for their support, which was the consideration for the conveyance. Such contract provided for delivery to the grantors and the survivor of them of specified articles at specified times for maintenance, and provided that during their lives, or the life of either survivor, they should have the use of a part of the dwelling house and a specified amount of land for a garden. The contract and deed were duly recorded. The husband died December 23, 1901. On December 23, 1903, John deeded his interest in the property to his brother Joseph, the deed being duly recorded. Joseph upon receiving the deed assumed John's obligations under the contract for support. February 26, 1905, he mortgaged the property to defendant Krause to secure an additional loan. Plaintiff at that time, no consideration moving to her, but solely to assist Joseph, quitclaimed her interest in the property to Krause. As part of the transaction it was agreed between the parties that in case of payment of all the indebtedness to Krause within three years the property should be conveyed to plaintiff and Joseph. As a further part of the transaction plaintiff signed a satisfaction which was delivered to Krause, reciting that it was of a mortgage to secure fulfilment of the ob-

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ligations of a life lease to plaintiff and her husband. There was no such mortgage in fact. As a further part of the transaction, intended to evidence the agreement aforesaid as to redeeding, a land contract was made which was supposed by the parties thereto and plaintiff to run to the latter and Joseph. The land contract was not recorded till February 9, 1906. Neither plaintiff nor any one concerned intended that the contract for support should be superseded except so far as necessary to secure Krause. Plaintiff could speak only in the Polish language, Krause could speak only in German and imperfectly in English, and Joseph could speak only in Polish and imperfectly in English. Joseph and Krause could not converse with each other except with difficulty in English. Plaintiff and her son were below the ordinary in intelligence and without business experience. All the papers aforesaid except the land contract being recorded, Joseph, February 8, 1906, quitclaimed the property to defendant *Wegenke* and assigned to him his interest aforesaid in the contract with Krause. The consideration named in the deed was $1,910. The conveyance, contract to Krause, and assignment thereof by Joseph were immediately duly recorded. *Wegenke* was duly informed by Joseph at the time of the transaction of plaintiff's interest in the premises and that his conveyance was subject thereto. February 25, 1906, with knowledge as aforesaid and that plaintiff would insist upon her rights, *Wegenke* tendered to Joseph, at the home on the place then occupied by plaintiff, the balance of the consideration mentioned in the deed to him after deducting the amount due Krause. Joseph refused to receive the money. *Wegenke* then left it on the table and Joseph straightway deposited the same subject to *Wegenke's* demand and informed him thereof, and at the commencement of the action it was tendered to him and payment thereof upon the trial subject to the order of court was offered. *Wegenke* knew all the time of plaintiff's interest under the contract for support and that

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she had been from the beginning and was in possession of the premises, using the dwelling-house forty as a homestead. Such occupancy was adverse to the extent of her interest. Joseph breached the contract for support of plaintiff in failing to supply the articles and perform the services agreed upon for her support.

Upon such findings the court decided that the written contract between Krause and Joseph should be reformed so as to conform to the intention of the parties at the time it was made, as stated; that the deed to John and contract back and record thereof should be canceled; that plaintiff's homestead and dower right in the premises should be established as if no such deed and contract had been made; that *Wegenke* was entitled to his election whether to hold under his deed from Joseph the rights of the latter and his brother John as heirs at law of their father, or to take the money tendered less the costs of the action, which should go against him. He however, in case he desired to hold under the deed, within thirteen days of the service upon his attorneys of a copy of the judgment, to serve upon plaintiff's attorneys a notice of his election in that regard, in which case plaintiff's attorneys should pay into court the amount of the tender, less the costs adjudged against *Wegenke,* the same to be paid to the latter upon his demand. Judgment was rendered according to the decision, the costs being taxed at $151.08. Within the time limited therefor *Wegenke* elected to retain under his deed the title to the property subject to plaintiff's interest and the mortgage interest of Krause. Subsequently he appealed from the judgment.

For the appellant there was a brief by *Edward F. Kileen* and *B. B. Park,* and oral argument by *Mr. Kileen.*

D. W. McNamara, for the respondent.

MARSHALL, J. It seems to be conceded by appellant, as might well be the case, upon the facts found which are not

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now challenged, that the judgment is right so far as it secures plaintiff her dower and homestead rights in the premises, subject to such rights as he acquired under the deed from Joseph, Sr., and the assignment of the land contract as reformed, given by Krause at the time the deed was made to him. But it is insisted by appellant that his title is referable to that of the deceased grantor of John through the conveyance to the latter and subsequent conveyances, instead of through the descent of such title to John and Joseph as heirs at law of their father and such transfer; that the condition precedent, arising out of the circumstance of the conveyance to John, as to the deceased, should not be regarded as having survived his death. In that view it seems to be thought that appellant because of his dealings with Joseph, Jr., should be left an opportunity of subrogation to the rights of Krause under, at least, the mortgage outstanding at the death of Joseph, Sr., for the protection of his title against the claim of respondent, and the heirs of the latter other than John and Joseph, if there be any.

Manifestly if appellant obtained by the judgment all he is entitled to, it is immaterial whether it be referable to the title of Joseph, Sr., through mesne conveyances or through descent to his heirs at law and such conveyances.

We are unable to discover anything in the transaction between appellant and his grantor, Joseph, Jr., upon which the right of subrogation claimed can be grounded.

Subrogation is based on rules of equity. It is a creation of the law whereby the substantial ends of justice may be accomplished regardless of contract relations. If a person for the protection of his title to property is compelled to pay off a lien thereon for a debt which he is not liable for, so that another having an interest in the property and who stands prior in obligation to pay the debt either because of being the debtor or being more immediate to the creator of the lien, will be relieved of the burden, equity immediately operates in favor

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of the payor, preserving the lien for his protection to the extent that he would otherwise suffer loss to such other's gain. *Charmley v. Charmley,* 125 Wis. 297, 103 N. W. 1106.

There is no such situation disclosed in the record as the one suggested nor opportunity therefor as regards protection of appellant. He took a quitclaim deed from Joseph, Jr., for a consideration of $1,910, to be paid, as appears, to Krause to the extent of his mortgage interest and the balance to the former. He took with full knowledge of the rights of respondent, giving only the value of Joseph Jr.'s equity. That was the entire title so far as it reached John and Joseph by descent or otherwise, subject to whatever rights respondent had and subject to the Krause mortgage interest, the measure of which, as seen by the acts of the parties, was taken account of as a burden to be borne by appellant. If he speculated on the probability of acquiring plaintiff's interest in the property upon the theory that she had irrevocably parted with it, that such interest was her right to support under the contract given by John and had been parted with by the transaction with Krause, of course he must take the consequences after the ordinary manner of risks of speculation. As between him, Joseph, Jr., and the plaintiff, he, not they or either of them, is the one to discharge the mortgage burden on the property, as he seems to have recognized after the entry of judgment by electing to leave to Joseph, Jr., according to the original idea, the balance of the $1,910 named in the latter's deed to him after deducting the amount requisite to discharge such interest. If there be any opportunity for subrogation under any circumstances it is a possession of the respondent against appellant in case of her having to pay Krause. Appellant had no equity in that regard; not the least.

In this disposition of the case it becomes unnecessary to pass on the question of whether the decision below should have been limited to giving effect to the condition subsequent in the original transaction so far as necessary to restore re-

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spondent to her former position. In any event appellant got all he was entitled to as regards the parties before the court. If there are other heirs than John and Joseph, whose interests are contingent upon whether the deed to John should have been wholly superseded or only as to respondent, the rights of such heirs are not affected by the judgment nor are the rights of appellant as regards them. They should have been brought in on motion of appellant, or without any motion. While there is some language in the complaint suggesting other heirs than those before the court, the findings are entirely silent in respect to the matter. On the whole, we have concluded to affirm the judgment because each party before the court got just what he or she was entitled to, and as between appellant and other parties interested, if there be such, the situation is unaffected by the judgment.

By the Court.—The judgment is affirmed.

WILL OF RUGGLES: ROSE, Appellant, vs. RUGGLES, Trustee, Respondent.

December 18, 1908—January 5, 1909.

Wills: Construction: Advancements.

Testator gave to trustees the residue of his estate to be divided into as many equal shares or portions as he had children (there were two), and directed that there should be paid to a daughter, within one year after the probate of his will, one fourth of her share, and otherwise directed as to the disposition of the residue of her share. The will also provided that any advancements to his children "shall be added to and deemed a part of my estate in this will bequeathed and devised in trust," and that "in the division of said estate into shares, as hereinbefore provided, the [advancements] shall be deducted from the share of the child or children against whom such charges or charge shall be made." *Held:*

(1) The bequest to the trustees being of money and property belonging to the deceased at the time of his death, advance-

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ments made by the testator did not come to the trustees, since such advancements were not such property as belonged to the testator at the time of his death.

(2) The conception and intent of the language of the will was merely to direct such method of computation as that the proportioning of the actual property held by the trustees between the children should give to the one receiving less advances a proportionate superiority over the other child.

(3) The words used aptly expressed an intention that, as preliminary to the action of the trustees, the one-half of the estate attributable to the daughter should be ascertained by dividing the estate plus the advancement by two, one half for each child, and that the amount of the advancement to her should be deducted from the same one-half share, and the remainder pass to the trustees to be managed and divided by them in the proportions prescribed by the will.

TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Petition by the executor for construction of certain clauses in the will of Augustus G. Ruggles, deceased. The will, after making several bequests, provided by its fifth paragraph as follows:

"I give, bequeath and devise unto said George D. Ruggles, James B. Perry and said Anna Ruggles Peck, and the survivors and survivor of them and their successors, all the rest, residue and remainder of my property, whether real, personal or mixed, and wherever situated, in trust, nevertheless, to and for the uses and purposes following, that is to say: To convert the same into money, stocks or other securities, and divide them into as many equal shares or portions as there shall be living of children born to me, including any child or children begotten by me and born after my decease, to be held in trust by them, one share for each such child, and dispose of them as follows, to wit: Pay to my daughter *Gertrude Colden Ruggles Rose,* within one year after the proof and allowance of this my will, or as soon thereafter as practicable, one fourth of her share or portion, retaining the residue thereof, and investing and keeping invested the same in such manner as to them, the survivors and survivor of them

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and their successors shall best seem, and pay to my said daughter the interest and income derived therefrom until she shall attain the age of fifty years, if she shall live so long, at which time they shall pay to her one third of said residue, retaining the remaining two thirds of such residue, and pay to her during her natural life all interest and income derived therefrom quarterly, or as near quarterly as practicable; and from and after her death, without issue her surviving, such residue to go to my heirs at law who may be living at that time; provided that if my said daughter shall survive her husband, H. H. Rose, my said trustees are hereby authorized and empowered to pay to her, should she desire, as soon after the death of said H. H. Rose as practicable, one half of said two-thirds residue, and the income of the remaining one half thereof during her natural life, the principal of which after her death, without issue her surviving, shall go to my heirs at law then living. To invest and keep invested the share or portion set apart for my son *Augustus G. Ruggles,* and during his minority, pay over to his guardian from time to time as said guardian may require, the income derived therefrom, and said guardian is hereby authorized and requested to use the same, or so much thereof as in his judgment may be necessary for the support, maintenance and education of my said son until he attains the age of twenty-one years, at which time there shall be paid to my said son one fourth of said share or portion, and the income from the residue thereof until he attains the age of twenty-five years, at which time he shall receive from said trustees another one fourth or one third of said residue, and the income from the remainder until he attains the age of thirty years, when the remaining portion of the principal sum of his share shall be paid to him. Provided, that if my said son, *Augustus G. Ruggles,* or my daughter *Gertrude Colden Ruggles Rose* shall die, leaving no issue, before receiving the full shares or portions herein provided to be paid to him or her, such shares or portions not received by him or her, shall go to my heirs at law who shall be living at the time of his or her death. . . . Provided, that if any of my said children shall die before receiving his, her or their share, the portion thereof not received by him, her or them, shall go to his or her children if any are left surviving; but if no issue survives, then to my heirs at law who

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shall be living at the time. Provided further, that if prior to my decease I shall have made any advancements to any of my children, either of money, stocks, other personal property or real estate, such advancement shall be added to and deemed a part of my estate in this my will bequeathed and devised in trust, for the benefit of my children, at the price of valuation named in the charge against any such child or children in my books of account, and in the division of said estate into shares, as hereinbefore provided, the same shall be deducted from the share of the child or children against whom such charges or charge shall be made, at the face of such charge without interest."

And by a codicil, which recited the proviso of said paragraph with reference to the payment to *Gertrude* in the event of her survival of her husband, modified the same in following words:

"Provided, that if my said daughter shall survive her husband, H. H. Rose, and live to be fifty years of age, one third of said two-thirds residue, that is one sixth of the original amount set apart as her share or portion, may be paid to her by my said trustees, should she desire it, as soon after the death of said H. H. Rose as practicable, but not however until after she is at least fifty years of age, and the income of the remaining portion of said two-thirds residue, during her natural life shall be paid to her, and the principal sum of said two-thirds residue, or so much thereof as shall not be paid to her as herein provided, shall after her death go to her issue her surviving, but if she shall die leaving no issue her surviving, the same shall go to my heirs at law then living."

Upon settlement by the executors the residue of the estate remaining applicable to the fifth paragraph of the will was $225,600, including an advancement of $8,000 to appellant. There being but two children, that total was divided into halves, or $112,800 each, one of said halves pertaining to a brother of the appellant, and the other to her. The trustees paid her $20,200 in money, which was $8,000 less than one quarter of said one-half. Later, after attaining the age of

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fifty years, she petitioned the county court for construction, and the county court construed the will as requiring payment to her within one year after testator's death of one quarter of all the property actually coming to the hands of the trustees for her, which he found to be $104,800, and a like sum upon her attaining the age of fifty years, and accordingly ordered that an additional $6,000 be paid her in satisfaction of the second instalment. Upon appeal the circuit court rendered judgment to the effect that the $8,000 of advancement should be treated as constituent part of the share passing to the trustees for the benefit of appellant and should be charged to her as a payment upon the first instalment, so that she should receive nothing additional in money upon that instalment, but should receive $28,200 as her second one-quarter by reason of having reached the age of fifty years. From that portion of the circuit court's judgment *Gertrude Colden Ruggles Rose* brings this appeal.

For the appellant the cause was submitted on the brief of *J. M. Gooding* and *H. H. Rose.*

For the respondent there was a brief by *Doyle & Hardgrove,* and oral argument by *T. L. Doyle.*

DODGE, J. There is usually little gain from discussion of different theories of construction of language used in a will. We have carefully studied the provisions of this will, separately and in their context and correlation with each other, and are persuaded that the intention of the testator was correctly apprehended and executed by the judgment of the county court. Certain considerations leading to and confirming that view may be briefly stated: The bequest to the trustees was of money and property belonging to the deceased at his death. Any advancements were not such property. They did not belong to the testator at the time of his death. They could not come to the trustees. The duties imposed upon the trustees with reference to the property coming to

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them under the bequest were such as to be consistent only with actual property which could be sold, converted into interest-bearing securities, and, in the words of the will, paid over, all of which tend to negative a mental conception in the testator of an estate made up of property and of advancements which could not be so handled and disposed of by trustees. We think the conception and intent plain merely to direct such method of computation as that the proportioning of the actual property held by the trustees between the children should give to the one receiving less advances a proportionate superiority over the other child. While the will directs that for purposes of such apportionment the advances should be deemed a portion of the estate, it nowhere declares that they should be deemed a portion of the share of the beneficiary, or that they should be taken in payment *pro tanto* upon such share, but commands that they should be deducted from the aliquot portion of the estate attributable to the advancee upon computation as above described. Had such conception or purpose as is effectuated by the judgment of the circuit court existed, nothing was easier than to express it in words identical with or similar to those used in sec. 3956, Stats. (1898), where it is declared that the advancement "shall be considered as a part of the estate . . . and shall be taken by such child or other descendant toward his share of the estate of the intestate." The will under consideration is couched in apt and legal phrases throughout, evidently prepared by a trained lawyer with much clearness and accuracy of expression. When such a writer directs that, after dividing the estate, including advancements, into halves, the amount of the advancement shall be deducted from one of the halves, there is strong presumption that he meant a different result from that which would be expressed by the phrase "shall be taken by the beneficiary toward her share." We think the words used aptly express the intention that, as preliminary to the action of the trustees, the one-half of the estate

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attributable to appellant should be ascertained by dividing the estate plus the advancement by two, one half for each child, and that the amount of advancement to her should be deducted from the same one-half share, and the remainder pass to the trustees to be managed and divided by them in the proportions prescribed by the will.

By the Court.—Judgment of the circuit court is reversed, and cause remanded with directions to affirm the judgment of the county court.

TIMLIN, J. (*dissenting*). I think the judgment of the circuit court should be affirmed. The testator, Augustus G. Ruggles, who died November 14, 1887, devised the rest, residue, and remainder of his estate to certain designated trustees in trust to convert the same into money, stocks, or other securities,

"and divide them into as many equal shares or portions as there shall be living of children born to me, including any child or children begotten by me and born after my decease, to be held in trust by them, one share for each such child, and dispose of them as follows, to wit: Pay to my daughter *Gertrude Colden Ruggles Rose,* within one year after the proof and allowance of this my will, or as soon thereafter as practicable, one fourth of her share or portion, retaining the residue thereof and investing and keeping invested the same in such manner as to them, the survivors and survivor of them, and their successors shall best seem, and pay to my said daughter the interest and income derived therefrom until she shall attain the age of fifty years, if she shall live so long, at which time they shall pay to her one third of said residue, retaining the remaining two thirds of such residue, and pay to her during her natural life all interest and income derived therefrom quarterly, or as near quarterly as practicable; and from and after her death, without issue her surviving, such residue to go to my heirs at law who may be living at that time; provided that if my said daughter shall survive her husband, H. H. Rose, my said trustees are hereby authorized and empowered to pay to her, should she desire, as soon after

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the death of said H. H. Rose as practicable, one half of said two-thirds residue and the income of the remaining one half thereof during her natural life, the principal of which after her death, without issue her surviving, shall go to my heirs at law then living. *To invest* and keep invested the share or portion set apart for my son *Augustus G. Ruggles,* and during his minority, pay over to his guardian from time to time as said guardian may require, the income derived therefrom, and said guardian is hereby authorized and requested to use the same or so much thereof as in his judgment may be necessary for the support, maintenance and education of my said son until he attains the age of twenty-one years, at which time there shall be paid to my said son one fourth of said share or portion and the income from the residue thereof until he attains the age of twenty-five years, at which time he shall receive from said trustees another one fourth or one third of said residue, and the income from the remainder until he attains the age of thirty years, when the remaining portion of the principal sum of his share shall be paid to him. Provided, that if my said son, *Augustus G. Ruggles,* or my daughter *Gertrude Colden Ruggles Rose* shall die, leaving no issue, before receiving the full shares or portions herein provided to be paid to him or her, such shares or portions not received by him or her shall go to my heirs at law who shall be living at the time of his or her death. And if there shall be any other child or children born to me, the share or shares set apart for him, her or them, shall be invested as hereinbefore provided and so much of the income derived therefrom as he may deem necessary and proper shall be paid from time to time to his, her or their guardian, to be used in his discretion, for the support, maintenance and education of such child or children during his, her or their minority, after which such income shall be paid direct to such child; the principal sum or sums of said shares or share to be disposed of as follows, to wit: One fourth shall be paid to him or her on attaining the age of twenty-one years, one fourth on attaining the age of twenty-five years, and the residue at the age of thirty years. Provided, that if any of my said children shall die before receiving his, her or their share, the portion thereof not received by him, her or them shall go to his or her children if any are left surviving; but if no issue survives, then to my heirs at law who shall be living at the time. Provided fur-

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ther, that if prior to my decease I shall have made any advancements to any of my children, either of money, stocks, other personal property or real estate, such advancement shall be added to and deemed a part of my estate in this my will bequeathed and devised in trust, for the benefit of my children, at the price of valuation named in the charge against any such child or children in my books of account, and in the division of said estate into shares, as hereinbefore provided, the same shall be deducted from the share of the child or children against whom such charges or charge shall be made, at the face of such charge without interest."

The testator added a codicil to said will, in which he

"Provided that if my said daughter shall survive her husband, H. H. Rose, and live to be fifty years of age, one third of said two-thirds residue, that is one sixth of the original amount set apart as her share or portion, may be paid to her by my said trustees should she desire it, as soon after the death of said H. H. Rose as practicable, but not however until after she is at least fifty years of age, and the income of the remaining portion of said two-thirds residue during her natural life shall be paid to her, and the principal sum of said two-thirds residue, or so much thereof as shall not be paid to her as herein provided, shall after her death go to her issue her surviving, but if she shall die leaving no issue her surviving, the same shall go to my heirs at law then living."

The testator had entered in his handwriting in his books of account:

"Debtor, *Gertrude Colden Rose née Ruggles* January 27th, 1886. I, A. C. Ruggles, have deeded to *G. C. Rose* the opera house property being the east half of and south twenty-five feet of the west half of lot 14, block 1, Darling addition. The value of which I consider and charge her herewith at $8,000, which sum at my death is to be accounted for and allowed for in her share of my estate as per provisions in my will, but to carry no interest so as to make the final division of my estate proper and just as far as any other heirs may be concerned."

The testator left, him surviving, two children, a residuary estate subject to the trust amounting, including the said ad-

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vancement, to $225,600, and, exclusive of the advancement, $217,600. *Gertrude* is now upwards of fifty years of age, and her husband, H. H. Rose, is living. The first payment to *Gertrude* which was absolutely due to her under the will one year after probate was $20,200, computed, as I believe correctly, as follows:

Trust estate	$217,600 00
Advancement to *Gertrude* added as directed by the will	8,000 00
Total	$225,600 00
There being but two children, take one half of this	112,800 00
One fourth of this half due *Gertrude*	28,200 00
Less advancement to her	8,000 00
Amount paid *Gertrude*	$20,200 00
Leaving a residue in this half of the trust estate of	84,600 00

Her present claim and the opinion of the majority of this court is that this first payment and the remainder should have been computed as follows:

One half of trust estate, including therein the advancement	$112,800 00
Less advancement to *Gertrude*	8,000 00
Remainder	$104,800 00
Of which *Gertrude* should have been paid one fourth, or	26,200 00
Leaving a residue in this half of the trust estate of	$78,600 00

Hence that there is in arrears to her from the first payment $6,000. But the language of the will is:

"In the division of said estate into shares as hereinbefore provided the same [the advancement] shall be deducted *from the share of the child* or children *against whom said charge shall be made.*"

The book entry relating to the advancement is:

"To be accounted for and allowed for in *her share* of my estate as per provisions in my will, but to carry no interest so as to make the final division of my estate *proper and just as far as any other heirs may be concerned.*"

It will be observed that by the majority opinion the $8,000 advancement to *Gertrude* is deducted from moneys not by the will belonging to *Gertrude,* but from the whole one half

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of the trust estate, in which one half *Gertrude* had by the will an absolute interest only of one fourth, a further interest of one fourth or one third of the remainder, which is the same thing, contingent upon her reaching the age of fifty years, and a further interest of one third of the remaining two fourths or one sixth of this one half of the estate contingent on her living to be fifty years of age and also surviving her then husband. This left one third of this one half to go by the will to the issue of *Gertrude* surviving her, if any. If none, to the heirs at law of testator living at the death of *Gertrude* without issue. Taking the figures heretofore referred to, the construction of the will and codicil declared by the majority of this court leaves the three-fourths remainder after the first fourth is paid to *Gertrude*, $78,600, deducting another fourth of the half or one third of this leaves $52,400, deducting one third of the remainder or one sixth of the one half would leave $34,934 for the issue of *Gertrude* or the heirs at law, as the case might fall out. If *Gertrude* had died after receiving the first payment and before reaching fifty years of age, nearly the whole of this advancement to her would come out of the shares of others; but as it is, if we apply the advancement against the first and only certain payment to *Gertrude*, we have the remaining three fourths of this one half equal to $84,600; deducting another one fourth of the half or one third of this sum leaves $56,400, and deducting one third of the remainder or one sixth of the one half leaves $37,600 for the issue of *Gertrude* or the heirs at law, as the case may be.

I do not think a construction of the will which results in deducting part of this advancement from the share of the issue of *Gertrude* or from the share of the heirs at law permissible or proper, or authorized by any language found in the will. To lawyers familiar with the law of testamentary trusts as that law was understood at the time this will was written, it must be apparent that the principal object of the testator in dividing the trust estate into as many parts or

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shares as he left children him surviving was to create as many separate trusts as there were children, and so conform to the New York rule stated in 22 Am. & Eng. Ency. of Law (2d ed.) 718, 719, and avoid the objection that the power of alienation was by the trust suspended for more than two lives in being in case there were more than two children. In all wills disposing of large estates and creating trusts, there is, as a general rule, a lawyer to counsel the manner of disposition in detail and to draft the will so as to conform to what he understands to be the law. It does not follow that, because a trust estate is divided into as many shares as there are children, the testator intended such larger division where he speaks of the share of a certain child, especially where the will only gives the designated child a fraction of such part or share and the income of the remainder of that share. To the testator and for the purpose of offsetting an advancement provided for in the will, the share of that child must be, I think, the share which such child is to actually receive. Secs. 3956–3961, Stats. (1898); 1 Am. & Eng. Ency. of Law (2d ed.) 760 *et seq.* The fact that the advancement is one provided for by will of course throws us back upon the inquiry what was the testator's intention; but facts, circumstances, and results are more potently indicative of intention than mere doubtful phrases, which may also well bear the reasonable meaning here attributed to them. I have no doubt that the true rule of law will be found to be that advancements to a devisee or legatee recognized by will should be set off against bequests or legacies absolutely or presently due to that devisee or legatee, rather than against contingent requests or legacies to the same devisee or legatee which may never become due, and that the advancement should always be set off against bequests due to the person to whom the advancement was made, rather than against a trust fund or a portion of a trust fund of which that person has only the income and the corpus of which belongs to other persons by the terms of the will.

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BOON and others, Respondents, vs. ROOT and another, Appellants.

December 18, 1908—January 5, 1909.

Life tenants: Acquisition of outstanding tax title: Fraud: Good faith: Burden of proof: Quieting title: Pleading: Plaintiff's title: Sufficiency of allegations of delivery of deed: Ejectment: Adequacy of remedy: Equity: Remaindermen: Right to possession: Tax titles: Limitation of actions.

1. In an action in equity to set aside conveyances the complaint alleged, among other things, that an aunt of the plaintiffs by deed made, executed, delivered, and recorded, conveyed the described property to C., her then husband, for the term of his natural life, and after his death to the plaintiffs, and that C. was in the actual possession as such life tenant when the premises were sold for unpaid taxes and a certificate of sale issued to R., a son of a second wife of C., and when such second wife obtained a tax deed on such certificate. It was also alleged that all of these parties wrongfully colluded together to secure such tax deed, fraudulently intending to obtain a tax title to the premises and thereby deprive plaintiffs of their interest therein. *Held*, on demurrer:

   (1) The allegations that C. was the life tenant, in possession, at the time the tax title was obtained by his second wife, and that she made her home with him, establish a fiduciary relation between the plaintiffs and the life tenant.

   (2) It was the duty of the life tenant, for the benefit of plaintiffs, to pay the tax charges upon the property during his tenancy.

   (3) The allegations as to failure of the life tenant to comply with such obligation pursuant to a collusive agreement between himself, his second wife, and her children for the purpose of obtaining the title to the lands and depriving plaintiffs of their interest therein, were sufficient to charge fraud.

2. In such case, under the allegation of the complaint that the second wife was the wife of the life tenant and occupied the premises with him as their home, she would be required to explain the transaction of securing the tax title and to establish that it was taken by her in good faith.

3. In an action by remaindermen to set aside a tax deed alleged to have been collusively obtained by a life tenant, his wife, and her children by a former marriage, allegations that the grantor made, executed, and delivered a conveyance of the premises to

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the remaindermen and life tenant as grantees therein, that it was duly recorded, and that the life tenant held possession under it as such life tenant, if proven, are sufficient to show execution and delivery of the instrument.

4. Under the allegations of a complaint the defendants were charged with fraudulently conspiring with a life tenant to deprive the plaintiffs, remaindermen, of their interest in lands which the defendants claimed to own under a tax title procured by such fraud. *Held*, that the instruments and muniments of title flowing from the tax-sale proceeding could not be reached in an action of ejectment, but would be left uncanceled.

5. In such case, to secure relief against the injurious acts affecting plaintiffs' interest in the land, such fraudulent and hostile record titles can only be impeached by proof of transactions *aliunde* the record; hence a suit in equity may be maintained to remove the clouds created by such fraudulent titles, and the court may in such suit decree the cancellation of such instruments and records and the execution of such conveyances as may be necessary to protect plaintiffs' right in the premises.

6. When the life tenant dies the remainderman may take the property under the conveyance, is entitled to the possession, and may maintain necessary actions to enforce his right.

7. Secs. 1188, 1189*a*, 1189*b*, Stats. (1898), prescribing limitations to actions by former owners to recover possession of lands sold for taxes, or to avoid a tax deed, have no application to actions to annul a tax deed for fraud in the proceedings.

8. In an action founded on fraud, if it be established that the plaintiffs, remaindermen, had no knowledge of the facts concerning the fraud until after the death of a life tenant, which occurred within a year prior to the commencement of the action, the action is one embraced within subd. 7, sec. 4222, Stats. (1898), under which the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, and hence is not barred by limitation.

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The complaint alleges the following facts: Lavina C. Curtis, a resident of the village of Rio, Wisconsin, was an aunt of the plaintiffs. On January 4, 1890, in expectation of death, she conveyed land, now known as lots 3 and 2 of block 1 in Dunlop's third addition to the village of Rio, to her husband, Delos Curtis, for the term of his natural life. After

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his death the property was to go to the plaintiffs, who were then living with their aunt, their mother having died in 1881. Lavina C. Curtis died January 16, 1890. The conveyance was recorded February 3, 1890. The plaintiffs, except *Rose V. Hoban,* removed, within a few weeks after the death of their aunt, to the home of their father in Chicago, where they have since resided. *Rose V. Hoban* went to her father's home in June or July, 1890. With this exception the plaintiffs have resided in Chicago since their removal thither. In July, 1890, Delos Curtis married Loretta D. Root, a widow, with two children by a former marriage. Delos Curtis failed and neglected to pay the taxes assessed against the premises, in which he held a life estate, and the premises were sold for $12.21 at the tax sale of 1892 to *William H. Root,* son of Loretta D. Curtis. On August 28, 1895, a tax deed was issued to Loretta D. Curtis as the owner of the tax certificate issued to her son. Notice of her intention to take a tax deed was served on her husband, but no notice was given to the plaintiffs. July 22, 1901, Loretta D. Curtis executed a life lease of the premises to Delos Curtis and *Carrie M. Bush,* her daughter. This lease was recorded August 30, 1901. May 29, 1903, Loretta D. Curtis executed a warranty deed of the premises, subject to the lease, to *William H. Root.* This deed was recorded September 9, 1903. Plaintiffs allege that Delos Curtis intentionally omitted and refused to pay the taxes assessed against the premises, that the tax deed was procured by the connivance and collusion of Delos Curtis, Loretta D. Curtis, *William H. Root,* and *Carrie M. Bush,* and that these tax proceedings were taken for the purpose of fraudulently cutting off and destroying the rights of the plaintiffs in the premises. Loretta D. Curtis died in 1905 and Delos Curtis died March 23, 1907. Plaintiffs allege that none of the facts regarding the procuring of the tax deed and the collusion and connivance of the defendants with the defendants' mother, and Delos Curtis

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in fraudulently securing this tax title, were known to them until after the death of Delos Curtis; that they had always believed that he, as life tenant under the deed from Lavina C. Curtis, paid the taxes on the premises, and that they had no knowledge or notice that the taxes were not paid. *Carrie M. Bush* is now in possession of the premises. She and her brother are the sole heirs at law of Loretta D. Curtis. Plaintiffs allege that they are the owners of the premises and that the defendants claim an interest therein adverse to the plaintiffs by and through the tax sale and tax deed. Plaintiffs tender and offer to pay *William H. Root* $12.21, with interest from the date of the tax sale. Plaintiffs demand that the tax proceeding, the life lease from Loretta D. Curtis to Delos Curtis and *Carrie M. Bush,* and the conveyance to *William H. Root* be set aside and held for naught, and that the defendants be required to release all their pretended interests in the premises, that plaintiffs be adjudged the owners of the premises, and that defendants deliver the possession. Defendants demurred to the complaint upon the grounds that it did not state facts sufficient to constitute a cause of action and that it was not commenced within the time limited by secs. 1188, 1189*a,* 1189*b,* subd. 7 of sec. 4222, and by secs. 4211, 4212, and 4215, Stats. (1898). This is an appeal from the order of the circuit court overruling the demurrer.

For the appellants the cause was submitted on the brief of *E. E. Brossard* and *H. S. Hendrickson,* attorneys, and *Ninian H. Welch,* of counsel.

H. E. Andrews, for the respondents.

SIEBECKER, J. The complaint alleges facts which plaintiffs claim constitute a cause of action against the defendants for fraud, accomplished by collusion with Delos Curtis, who was in possession of the premises as life tenant, and his wife, Loretta D. Curtis, residing with him, it being their purpose to secure a tax title to the premises in order to secure the title to this property and to deprive these plaintiffs of the in-

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terest they had in the land under the deed from their aunt. It is alleged that Delos Curtis was granted a life estate by such deed and that he was in actual possession of the premises, as such life tenant, when the premises were sold for unpaid taxes and a certificate of sale issued to the defendant *William H. Root,* and when Loretta D. Curtis, wife of the life tenant, obtained the tax deed on such tax sale. It is also alleged that all of these parties wrongfully colluded together to secure this tax deed, fraudulently intending to obtain a tax title to the premises and thereby deprive plaintiffs of their interest in them.

It is urged that the facts alleged respecting these transactions are not sufficient to constitute fraud. In determining this question the allegations that Delos Curtis was the life tenant, in possession, at the time the tax title was obtained by his wife, and that she made it her home with him, are significant as establishing a fiduciary relation between the plaintiffs and the life tenant. Under these allegations, which must be taken as true on demurrer, it was clearly the duty of the life tenant, for the benefit of the plaintiffs, to pay the tax charges upon the property during his tenancy. *Phelan v. Boylan,* 25 Wis. 679; *Hart v. Hart,* 117 Wis. 639, 653, 94 N. W. 890. His failure to comply with this obligation, and the allegation that he omitted so to do pursuant to a collusive arrangement between him, his wife, and her children for the purpose of obtaining the title to the land and depriving plaintiffs of their interest in it, states sufficient to charge a fraud. The claim that the fact that the tax deed was secured by the wife of the life tenant in possession operates to purge the alleged transaction of fraud is without merit. Under the allegation showing that she was the wife of the life tenant and occupied the premises with him as their home she would be required, under the allegations of the complaint, to explain the transaction of securing the tax title and to establish that it was taken by her in good faith.

It is claimed that the complaint does not allege that there

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was a delivery of the deed from Lavina C. Curtis to Delos Curtis and the plaintiffs. The allegations are that the grantor made, executed, and delivered a conveyance of the premises to the parties named as grantees therein, that it was duly recorded, and that Delos Curtis held possession of the premises under it as life tenant. These facts, if proven, are sufficient to show execution and delivery of the instrument.

It is contended that plaintiffs have mistaken their remedy in bringing this action in equity, and that an action in ejectment would furnish them a complete and adequate remedy for the enforcement and protection of their rights. As above indicated, the complaint charges that the defendants fraudulently conspired with the life tenant and their mother to deprive plaintiffs of their interest in the premises, and that the defendants claim to own the property under a tax title procured by such fraud. It is clear that, in an ejectment action against the defendant in possession, the instruments and muniments of title flowing from the tax-sale proceeding could not be reached and would be left uncanceled, and that to secure relief against injurious acts affecting plaintiffs' interest in the land such fraudulent and hostile record titles could only be impeached by proof of transactions *aliunde* the record. Under such circumstances a suit in equity may be maintained to remove the clouds created by such fraudulent titles, and the court may in such suit decree the cancellation of such instruments and records and the execution of such conveyances as it may feel necessary to protect the plaintiffs' rights in the premises. As stated in *Swihart v. Harless,* 93 Wis. 211, 67 N. W. 413:

"Fraud is the foundation of the action, and the principal relief sought is the setting aside of the results of the fraud, and lawfully compelling removal of defendant's claim of record against plaintiff's title." *Pier v. Fond du Lac,* 38 Wis. 470; *Burrows v. Rutledge,* 76 Wis. 22, 44 N. W. 847; *Davenport v. Stephens,* 95 Wis. 456, 70 N. W. 661.

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It is urged that plaintiffs have no interest in the premises, and hence have no right to prosecute this action. The deed under which they claim from Lavina C. Curtis conveyed the premises to Delos Curtis during his life, conditioned that he allow plaintiffs to live with him during his life, if they desired to remain on the premises, and that after his death the property should belong to the survivors. The effect of this conveyance was to grant the premises to Delos Curtis for life. After his demise they belonged to the plaintiffs. Since the life tenant is now deceased, the plaintiffs may take the property under the deed, and they are entitled to the possession of it.

It is also averred that the action is barred by the statutes of limitation. It is obvious that the limitations prescribed by secs. 1188, 1189*a*, 1189*b*, Stats. (1898), have no application to the cause of action alleged in the complaint, since these sections have no application to an action to annul a tax title for fraud in the proceedings. *Fox v. Zimmermann*, 77 Wis. 414, 46 N. W. 533. As we have heretofore indicated, the foundation of the action is fraud, against which relief is sought by invoking the general powers of equity to compel a cancellation of the tax proceedings and the conveyances based thereon, or, to protect plaintiffs in their ownership of the property, the conveyance of the claims and interests secured thereby to them. The power to grant relief from the consequences of the fraud alleged is within the established jurisdiction of equity, has been exercised from an early day, and is embraced within the provisions of subd. 7, sec. 4222, Stats. (1898), under which the cause of action "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." *Pier v. Fond du Lac, supra; Kruczinski v. Neuendorf*, 99 Wis. 264, 74 N. W. 974; *Davenport v. Stephens, supra; McMahon v. McGraw*, 26 Wis. 614; *Fox v. Zimmermann, supra.* It is alleged that the plaintiffs had no knowledge of any of the facts concerning the fraud charged until after the death of the life

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tenant, which occurred in 1907. If this is established as a fact, then the action is not barred by limitation. The court properly overruled the demurrer.

By the Court.—The order appealed from is affirmed.

STATE, Appellant, vs. HAMLEY, Respondent.

December 18, 1908—January 5, 1909.

Fines: Forfeiture: Civil actions: Criminal actions: Statutes.

1. The authority to maintain a civil action for the recovery of a fine imposed by statute must be found, if at all, in sec. 3294, Stats. (1898), providing for the recovery of forfeitures by civil action.
2. Sec. 3294, Stats. (1898), in express terms excludes a "fine," and defines a forfeiture to be a penalty in money or goods "other than a fine;" and while the words "forfeiture," "fine," and "penalty" are often used interchangeably, a fine imposed as a punishment for the violation of a public statute of the state cannot be recovered in a civil action under sec. 3294, but the remedy is by a criminal prosecution in the name of the state.
3. There is a distinction between fines imposed for breaches of municipal ordinances and those imposed by statutes of the state.
4. While prosecutions for breaches of municipal ordinances are *quasi*-criminal, such breaches are not offenses against the state and therefore not punishable as such.
5. A criminal action is one prosecuted by the state against a person charged with a public offense committed in violation of a public law.
6. The word "fine" in sec. 3294, Stats. (1898), is used in the same sense as the same word is used in sec. 2, art. X, Const. It does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violation of their ordinances.

APPEAL from a judgment of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is a civil action commenced in the circuit court for

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Green Lake county for the recovery of a fine imposed by sec. 8, ch. 305, Laws of 1905 (sec. 1636—54, Stats.: Supp. 1906), relating to the use of automobiles in public highways. Secs. 4 and 8 of this chapter read as follows:

"Sec. 4. Every person operating an automobile or other similar motor vehicle upon or along any of the public highways of this state shall upon a signal by putting up the hand, or other sign of distress, by a person riding or driving a horse or horses, which shall appear frightened, cause such automobile or other similar motor vehicle to stop all motor power and remain stationary, unless a movement forward shall be deemed necessary to avoid accident or injury, until such horse or horses appear to be under control; and shall if requested, assist such person or persons to pass such automobile or other similar motor vehicle in safety, it being the intent of this act that every reasonable precaution shall be exercised by the operator of any such automobile or other similar motor vehicle to prevent the frightening of such horse or horses and to prevent accident or injury. All motor power shall be stopped on any automobile or other similar motor vehicle while left unattended on the public highway."

"Sec. 8. Any person or persons who shall violate the provisions of sec. 1, 3, 5, and 6 of this act, except as provided in sec. 7, shall be punished by a fine of not less than ten dollars and not more than twenty-five dollars; any person or persons who shall violate the provisions of sec. 4 hereof shall be punished by a fine of not less than ten dollars nor more than fifty dollars."

When the action came on for trial the defendant objected to any evidence under the complaint on the ground that it did not state facts sufficient to constitute a cause of action, for the reason that a civil action for the recovery of the fine provided in sec. 8 would not lie, the proper action being a criminal prosecution. The court sustained the objection and ordered the action dismissed. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by the *Attorney General* and *W. E. Cavanaugh,* district attorney, and oral argument by *Mr. Cavanaugh*

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For the respondent there was a brief by *L. E. & Roy Reed,* and oral argument by *Roy Reed.*

KERWIN, J. The question presented is whether a civil action for the recovery of a forfeiture can be maintained or whether the action should have been criminal. The authority to maintain a civil action for the recovery of the fine imposed must be found, if at all, in sec. 3294, Stats. (1898), which reads:

"In all cases, not otherwise specially provided for by law, where a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by fine and imprisonment or by fine or imprisonment or is specially declared by law to be a misdemeanor it shall be deemed a misdemeanor within the meaning of this chapter. The word forfeiture, as used in this chapter, shall include any penalty, in money or goods, other than a fine."

This section in express terms excludes a "fine," and defines a forfeiture to be a penalty in money or goods "other than a fine." So it seems clear that the right to recover a fine imposed for the violation of a public law is not embraced within this section. Counsel for appellant relies upon cases in this court, notably *State v. Grove,* 77 Wis. 448, 46 N. W. 532, where the fines were imposed under the provisions of municipal ordinances. It will be seen, however, that a distinction is recognized under the authorities between fines imposed for breaches of municipal ordinances and those imposed by statutes of the state. *Stoltman v. Lake,* 124 Wis. 462, 102 N. W. 920; *Koch v. State,* 126 Wis. 470, 106 N. W. 531; *Oshkosh v. Schwartz,* 55 Wis. 483, 488, 13 N. W. 552; *State ex rel. Milwaukee v. Newman,* 96 Wis. 258, 71 N. W. 438; *Ogden v. Madison,* 111 Wis. 413, 87 N. W. 568.

While prosecutions for breaches of municipal ordinances are *quasi*-criminal, such breaches are not offenses against the

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state and therefore not punishable as such. A criminal action is one prosecuted by the state against a person charged with a public offense committed in violation of a public law. *Koch v. State, supra,* and cases therein cited.

"The word 'fine' as used in sec. 3294 is used in the same sense as the same word in sec. 2, art. X, of the constitution. It does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violating their ordinances." *Stoltman v. Lake,* 124 Wis. 462, 102 N. W. 920.

While the words "forfeiture," "fine," and "penalty" are often used interchangeably, yet a fine imposed as punishment for the violation of a public statute of the state cannot be recovered in a civil action under sec. 3294, Stats. (1898), but the remedy is by a criminal prosecution in the name of the state. It follows, therefore, that the judgment below was right and must be affirmed.

By the Court.—The judgment is affirmed.

BROOKLYN CREAMERY COMPANY, Respondent, vs. FRIDAY, Appellant.

December 18, 1908—January 5, 1909.

Sales: Action for goods sold and delivered: Pleading: Complaint: Counterclaim: General denial contained in reply: Variance: Materiality: Amendment to conform to proofs: Appeal and error: Review: Objection first made in appellate court.

1. Under a complaint for goods sold and delivered at an agreed price plaintiff is at liberty to show any contract of sale, oral or written, under which the goods in question were delivered.
2. Where, in answer to such a complaint, the defendant pleaded by way of counterclaim that the contract was such as to require further deliveries, which plaintiff had failed to make, if the plaintiff wished to rely upon a modification of the contract and

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default of the defendant in performing the contract so modified sufficient to excuse further deliveries, strictly the reply should have pleaded such modification.

3. In such case, however, a general denial in the reply put in issue the existence of the contract pleaded in the counterclaim, and it was therefore no material variance to admit evidence of the modification in explanation or justification of the plaintiff's refusal to make further deliveries.

4. In such case, the action having been tried before a referee, in the absence of any request in that behalf it is too late to allege in the supreme court for the first time that, had defendant been apprised by the pleadings before trial of the claim that the contract had been modified, he could have secured an important witness to the contrary.

5. In such case an amendment of the pleadings to conform to the proof is *held* proper.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment in an action at law upon contract.

For the appellant the cause was submitted on the brief of *Duffy & McCrory.* Among other references they cited *Ninman v. Suhr,* 91 Wis. 392, 64 N. W. 1035; *Wanzer v. Howland,* 10 Wis. 8; *Duval v. Am. T. & T. Co.* 113 Wis. 504, 89 N. W. 482; *Computing S. Co. v. Churchill,* 109 Wis. 303, 85 N. W. 337; *Goodwin v. Merrill,* 13 Wis. 658; *Gordon v. Brewster,* 7 Wis. 355; 8 Am. & Eng. Ency. of Law (2d ed.) 632.

For the respondent there was a brief by *Perry Niskern,* attorney, and *John J. Wood, Jr.,* of counsel, and oral argument by *Mr. Wood.* Among other references upon the part of the respondent were *Montgomery v. Am. Cent. Ins. Co.* 108 Wis. 146, 84 N. W. 175; *Hilliard v. Wis. L. Ins. Co., ante,* p. 208, 117 N. W. 999; 9 Cyc. 734; sec. 2830, Stats. (1898); *Hammer v. Schoenfelder,* 47 Wis. 455, 2 N. W. 1129; 2 Greenl. Ev. § 261, notes.

TIMLIN, J. The plaintiff went to trial before a referee upon a complaint for goods sold and delivered at an agreed

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price of $725.42, of which $507.95 had been paid, leaving due $217.47. The defendant's answer denied generally, except as explained, and averred in explanation that the plaintiff had entered into an agreement with him whereby plaintiff was to furnish and deliver the entire output or product of its creamery, with certain specified exceptions, at a stated price, and that plaintiff made several deliveries on the contract, which were paid for by defendant, and one which was not paid for in full, but upon which there was a balance of $210 unpaid because the plaintiff refused to make further shipments. Defendant also interposed a counterclaim against plaintiff for breach of the last-mentioned contract. The plaintiff by verified reply made general denial to the counterclaim. The referee in time reported his findings of fact and conclusions of law to the circuit court, substantially to the effect that there was a contract made between the parties, as claimed in the answer, upon which there was $210, with interest at six per centum from July 7, 1902, due from defendant to plaintiff; that said contract was so modified by subsequent agreement as to require the defendant to give certain security for future deliveries to him. Defendant failed to do so, and the plaintiff rightfully refused further deliveries; hence nothing was allowed on the counterclaim. Upon cross-motions for confirmation and for modification of the referee's report the court permitted the plaintiff to amend its complaint to conform to the proof already in before the referee by averring a contract of the tenor and effect stated in the answer and a modification thereof as mentioned. Judgment was given for the plaintiff for the sum of $210, with interest and costs. The appellant contends that these rulings of the circuit court were erroneous and prejudicial. We perceive no error in the rulings. *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55.

Under the form of pleading followed in the complaint the plaintiff was at liberty to show any contract of sale, oral or written, under which the goods in question were delivered.

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The defendant, as a basis for its counterclaim, very properly pleaded that said contract was such as to require further deliveries, which the plaintiff failed to make. Strictly, the reply of the plaintiff to this counterclaim should have pleaded modification of this contract, and default of the defendant in performing the contract so modified sufficient to excuse the plaintiff from further deliveries. But the general denial of the plaintiff to the counterclaim put in issue the existence of the contract as pleaded by the defendant. It was therefore no very material variance to admit evidence of the modification in explanation or justification of the plaintiff's refusal to make further deliveries. The defendant claims that, had he been apprised by the pleadings before trial of this claim that the contract was modified, he could have secured an important witness to the contrary. But he was informed by the testimony before the referee, and we are all aware how readily an adjournment could have been obtained before the referee if applied for, and how liberal the courts are, upon proper application at the time of confirmation, to re-refer for the purpose of taking some omitted item of proof or to take such proof then and there. But no such request was made, and it is too late in this court to indulge in mere hypotheses with reference to what this witness might testify. The amendment of the pleadings to conform to the proof was proper. Sec. 2830, Stats. (1898); *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55; *Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032; *Kersten v. Weichman,* 135 Wis. 1, 114 N. W. 499.

By the Court.—The judgment of the circuit court is affirmed.

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CARSTENS and others, Appellants, vs. CITY OF FOND DU LAC and another, Respondents.

December 19, 1908—January 5, 1909.

Municipal corporations: Public improvements: Assessment for benefits: Exemption from taxation: Vested rights: Estoppel: General city charter: Amendment: Repeal of parts of special charter: Pleading: Complaint: Joinder of causes of action: Demurrer: Temporary injunction: Dissolution: Discretion.

1. The charter of the city of Fond du Lac (ch. 59, P. & L. Laws of 1868, as amended by ch. 299, Laws of 1885) provides that two thirds of the total cost of street paving may be charged against abutting property, leaving one third to be paid by the city, but that such provision should not apply to second or subsequent repaving of any street which had theretofore or should be thereafter paved. Under this provision the street in front of plaintiffs' premises was improved in 1890 through its entire width and two thirds of the expense thereof, except street crossings, was charged against the real estate fronting thereon and paid by the owners thereof, the remaining one third being paid by the city. After the passage of the amendment of 1885 a number of streets of the city which had theretofore been paved at the expense of the abutting property owners were repaved, but at the expense of the city. In 1904 the city of Fond du Lac adopted the portions of the general city charter law relating to street improvements in lieu of those contained in its special charter, and in 1907 repaved the street on which plaintiffs' property abutted and sought to charge the abutting property with the expense of the repaving under the provisions of the general city charter law. *Held:*

(1) Even if the city authorities incorrectly construed the amendment of 1885, and a portion of the cost of repaving done thereafter should have been paid by special assessment against abutting lots, the city was not thereafter estopped from making a special assessment to defray the expense of a new pavement under that part of the general city charter adopted by it.

(2) Compliance with a statutory duty enjoined upon the lot-owners did not create a contract by operation of law which exempted the plaintiffs from further special assessments for the cost of street paving.

(3) The amendment of 1885 did not give any vested rights to exemption from further special assessments on account of repaving.

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(4) The amendment of 1885 was subject to amendment and was amended by the adoption of that portion of the general city charter which related to street improvements in lieu of the provisions of the special charter, and thereafter the provisions of the special charter governing street improvements stood repealed.

2. An action by a taxpayer in his own behalf and in behalf of other taxpayers in interest, to declare void special assessments against property abutting on a portion of a street improved by paving, is not an action respecting a common fund, nor to assert a common right, nor to restrain acts injurious to property in which the plaintiffs have a common interest or a common right, since the real redress which the taxpayer is seeking is to relieve his own property of a tax which he asserts is void in whole or in part, and whether his neighbor pays or contests the tax does not directly concern him.

3. A complaint in such action is demurrable for misjoinder of causes of action rather than misjoinder of parties, since the complaint sets forth separate causes of action, one in favor of each plaintiff, without being separately stated.

4. Where a complaint is demurrable only because several causes of action have been improperly joined, it is within the field of judicial discretion to continue a restraining order issued thereon in force until the plaintiff is given an opportunity to amend.

5. Where the only allegations of a complaint that would support an injunction were made on information and belief, and such averments were positively contradicted by affidavits filed on a motion to dissolve a temporary injunction and were not supported by counter affidavits, the court is *held* to have properly granted a motion to dissolve the injunction.

APPEAL from an order of the circuit court for Fond du Lac county: JAMES O'NEILL, Judge; also from an order and a judgment of the same court: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The plaintiff brings this action as a taxpayer, in his own behalf and in behalf of other taxpayers in interest, to declare void certain assessment certificates issued against property abutting upon a portion of Third street in the city of *Fond du Lac,* and to restrain the city from selling, transferring, or otherwise disposing of any such certificates that might have been issued and in its possession at the time the action was

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commenced, and to compel the surrender of such certificates for cancellation. A preliminary injunction was granted restraining the city from issuing or transferring such improvement certificates or bonds during the pendency of the action. It is alleged in the complaint that during the year 1907 said city of *Fond du Lac* entered into a contract with the *Barber Asphalt Paving Company* for the paving of a portion of Third street in said city, and that said city had caused the entire expense of said improvement, excluding street crossings, to be made a charge upon the real estate fronting and abutting on such improvement. The *Barber Asphalt Paving Company* was named as one of the parties defendant in the action, and the relief prayed for against such company was that it be enjoined and restrained from selling, assigning, or transferring, or attempting to collect, any assessment certificates or improvement bonds that might have been issued to it for and on account of the street improvement which it had made on a portion of Third street under contract with its co-defendant.

It appears from the complaint in this action that by ch. 59, P. & L. Laws of 1868, the city charter of the city of *Fond du Lac* was amended and codified. Under the city charter as it existed prior to the passage of ch. 299, Laws of 1885, the cost or expense of paving streets might in whole or in part be charged to abutting property owners, and it appeared from the complaint that a number of the streets of said city were paved at the expense of such abutting owners. By ch. 299, Laws of 1885, the special charter of the defendant city was amended so that two thirds of the total cost of street paving might be charged against the abutting property, leaving one third to be paid by the city. The act referred to contained the following provision:

"Provided, however, that the provisions of this subdivision shall not apply to a second or subsequent repaving, macadamizing or graveling of any street which has been heretofore

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or shall be hereafter paved, macadamized or graveled; and the whole or any portion of the expense of such improvement shall have been borne directly by the lots or parcels of land fronting or abutting on the portion of the street so improved. . . ."

After the passage of the law of 1885 and during the year 1890 the city caused a certain portion of Third street to be improved by the laying of cedar-block pavement thereon throughout its entire width, two thirds of the expense of which improvement, excluding street crossings, was made a charge against the real estate fronting and abutting on said improvement and was paid by the owners thereof, and the remaining one third was paid by the city.

After the passage of the law of 1885 a number of the streets of said city, which theretofore had been paved at the expense of abutting property owners, were repaved, but at the expense of the city. In 1904 the city adopted the portions of the general charter law relating to street improvements in lieu of those contained in the special charter. During the year 1907 the contract involved in this action was entered into, which provided for the repaving of a portion of Third street which had been paved at the expense of the abutting owners and of the city, in the proportion of two thirds and one third, in the year 1890. The city seeks to charge the abutting property owners with the expense of the repaving provided for by the contract of 1907 under the provisions of the general charter law. The plaintiffs in the action insist that they were exempted from any further liability for or on account of paving Third street by virtue of the provisions of ch. 299, Laws of 1885, and more particularly by virtue of the action of the city after such law was passed in assuming the expense of repaving certain other streets in the city which had first been paved at the expense, in whole or in part, of the abutting property owners.

As a second cause of action it was alleged that the assessment of benefits and damages was made in an arbitrary and

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illegal manner and should be set aside for this reason if for no other.

The defendants appeared separately in the action, and each moved that the injunction be dissolved, which motion was granted. Each of the defendants also interposed a demurrer to the complaint (1) on the ground that the court had no jurisdiction of the subject of the action; (2) that several causes of action had been improperly united; and (3) that the complaint did not state facts sufficient to constitute a cause of action. Such demurrers on the foregoing grounds were interposed to each of the two causes of action that were separately stated in the complaint, and the demurrers were sustained by the trial court, and, the plaintiff declining to amend his complaint, judgment was entered dismissing the same. From the orders dissolving the preliminary injunction and sustaining the demurrers, and from the final judgment in the action, this appeal is taken.

E. Blewett, for the appellant.

M. K. Reilly, for the respondent city.

Frank M. Hoyt, for the respondent *Barber Asphalt Paving Company.*

Barnes, J. Because in the year 1890 the plaintiffs paid their legal portion of the cost of paving that part of Third street in the city of *Fond du Lac* adjacent to their properties, and the city construed ch. 299, Laws of 1885, as not empowering it to charge an abutting owner with the cost of a subsequent pavement, it is asserted that the plaintiffs are forever immune from any special charge against their properties on account of paving the street adjacent thereto. This contention is grounded on the assertion that plaintiffs have a vested right of exemption from special assessment on account of such paving under the law above referred to, and also upon the claim that the city by its conduct has estopped itself from making any such assessment. It is urged that inasmuch

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as a large amount of repaving was done at the general expense of the city after the passage of the law of 1885, and the plaintiffs have been compelled to contribute their share of such expense through taxation on their Third-street property, it would be inequitable to require them to again assume the principal part of the cost of repaving such street. The argument is plausible but not convincing. No scheme has yet been devised by which an equal and exact distribution of the burden of taxation can be made. The right of exemption invoked, if upheld, might well result in greater injustice than would arise from failure to enforce it. If the contention of plaintiffs is well founded, the real estate of all property owners of the city of *Fond du Lac,* against which was charged a part of the expense of paving a street adjacent thereto from the year 1885 to the year 1904, would be forever exempt from paying any special assessment for repaving such street. The expense, perforce, would have to be borne by a general tax levy. The owners of property abutting on streets not paved in the manner stated between 1885 and 1904 could be obliged to pay for the cost of paving the streets adjacent to their properties under the provisions of the general charter law adopted in 1904, and, in addition thereto, would be obliged to defray their portion of the expense of repaving streets adjacent to the exempt property, if the contention of plaintiffs is correct. It is not difficult to see that such a condition might be grossly inequitable to such property owners as were not called upon to pay a special assessment for pavement expenses within the period stated.

Assuming that the law was not correctly construed by the city authorities, and that a portion at least of the cost of repaving done after 1885 should have been paid by special assessment against abutting lots, the city was not thereafter estopped from making a special assessment to defray the expense of a new pavement under the general charter law adopted by it. The compliance with a statutory duty en-

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joined upon the lotowners did not create a contract by operation of law which exempted the plaintiffs from further special assessments for the cost of street paving. *Rochester v. Rochester R. Co.* 182 N. Y. 99, 74 N. E. 953. Neither did the 1885 statute give any vested right to exemption from further special assessments on account of repaving. At best, all the law did was to prohibit such assessments as long as it remained in force. It was subject to amendment in this regard, and was amended by the adoption of the portion of the general charter law which related to street improvements in lieu of the provisions of the special charter. *Boyd v. Milwaukee,* 92 Wis. 456, 460, 66 N. W. 603; *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *Washburn v. Oshkosh,* 60 Wis. 453, 19 N. W. 364.

It is urged that the adoption of so much of the general charter law as pertained to street improvements did not operate to repeal ch. 299, Laws of 1885, the portion of the special charter conferring the alleged exemption. Such act was a part of the special charter relating to street improvements. The provisions of the general law relating to such improvements were adopted in their entirety in lieu of all provisions on the same subject found in the special charter. We see no escape from the conclusion that the special charter provision under consideration was repealed. The effect of the action of the common council of the city in adopting portions of the general law is more fully considered in *Willmer v. Goebel, ante,* p. 419, 119 N. W. 115.

The decided cases in this court sustain the ruling of the trial judge in holding that the complaint was demurrable because several causes of action were improperly united. The plaintiff *Carstens* was interested only in relieving his own property from the special assessment in question. Whether his neighbors paid or contested the tax did not directly concern him. Their paying the tax could not injure him, while it might be a benefit, because his portion of the general tax

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for street improvements might thereby be lessened. To be sure, each lotowner on the portion of Third street which was improved had a common interest in the action to the extent that, if *Carstens* had the right to relief, others might for the same reasons and on the same evidence obtain relief. But the property owners had no such common pecuniary interest as authorized them to unite in one suit as plaintiffs. *Barnes v. Beloit,* 19 Wis. 93; *Newcomb v. Horton,* 18 Wis. 567; *Howland v. Kenosha Co.* 19 Wis. 247; *Gilkey v. Merrill,* 67 Wis. 459, 30 N. W. 733; *Foster v. Rowe,* 132 Wis. 268, 111 N. W. 688; *Ill. S. Co. v. Schroeder,* 133 Wis. 561, 113 N. W. 51.

This is not an action respecting a common fund, nor to assert a common right, nor to restrain acts injurious to property in which the plaintiffs have a common interest or a common right. The right of a taxpayer to bring an action in his own behalf and in that of all other taxpayers is undoubted in such a case, or wherever municipal authorities are about to unlawfully dispose of public property, or pay out public funds, or enter into unlawful or unauthorized contracts which will require the use of public funds to discharge them, or are squandering the property of the taxpayers. The authorities which hold that such right exists are numerous. *Peck v. School Dist.* 21 Wis. 516, 522; *Willard v. Comstock,* 58 Wis. 565, 17 N. W. 401; *Bay L. & I. Co. v. Washburn,* 79 Wis. 423, 48 N. W. 492; *McVichie v. Knight,* 82 Wis. 137, 51 N. W. 1094; *Fowler v. Superior,* 85 Wis. 411, 54 N. W. 800; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964; *Quaw v. Paff,* 98 Wis. 586, 74 N. W. 369; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851. The doctrine of the foregoing cases does not apply where the real redress which the taxpayer is seeking is to relieve his property of a tax which he asserts to be void in whole or in part.

It is urged that there is a misjoinder of parties rather than

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of causes of action. This is not correct. The complaint "sets forth separate causes of action, one in favor of each plaintiff, without being separately stated; and if so, several causes of action are improperly united." *Barnes v. Beloit, supra.* It follows that the demurrers interposed because several causes of action were improperly united were properly sustained.

The plaintiffs declined to amend their complaint and a judgment of dismissal was entered. The judgment being correct, it is not necessary to decide other questions argued on the appeal. There are allegations in the complaint which tend to show that the alleged assessment of benefits and damages made by the board of public works was unjust, arbitrary, and illegal. If the plaintiff were suing simply to remove the cloud from the title to his own property created thereby, we do not decide that a case for relief has not been shown. Neither do we decide that it has. Secs. 925—184 and 925—185, Stats. (1898), purporting to give a remedy to the lot-owner by appeal from the action of the common council and to make such remedy exclusive, raise a serious question as to the right of the plaintiff *Carstens* to ignore such remedy and resort to a court of equity in the first instance. His silence while the board of public works and the city council were taking action in reference to the special assessment and while the improvement was being made, likewise raises a question which might seriously affect his rights. *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 214, 77 N. W. 167. These questions, however, we do not pass upon.

The injunctional order issued in the case was dissolved before the demurrers were decided. If the only infirmity in a complaint is that several causes of action have been improperly joined, we think it is within the field of judicial discretion in a proper case to continue the restraining order in force until the plaintiff is given an opportunity to amend. The only allegations of the complaint in the suit before us

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that would in any view of the case support an injunction are made on information and belief. These averments are positively contradicted by certain affidavits filed on the motion to dissolve and are not supported by counter affidavits. Under these circumstances the court very properly granted the motion to dissolve. *Dinehart v. La Fayette,* 19 Wis. 677; *Tainter v. Lucas,* 29 Wis. 375; *Schœffler v. Schwarting,* 17 Wis. 31; *Smith v. Appleton,* 19 Wis. 468; *Pittelkow v. Herman,* 94 Wis. 666, 69 N. W. 805.

By the Court.—The orders and the judgment appealed from are affirmed.

WILL OF OHSE: OHSE, Executor, Appellant, vs. MILLER, Executor, Respondent.

December 19, 1908—January 5, 1909.

Wills: Construction: Bequests: Time of payment.

1. Rules for the construction of uncertain clauses in wills yield to the cardinal rule that the words of a will are to be construed so as to give effect to the intention of the testator, which intention is to be ascertained from the language of the will itself, in the light of the circumstances surrounding the testator at the time of its execution.
2. A testator devised his estate to a son with the condition that the son pay to his widow $800, "to be paid her as it becomes necessary for her needs." *Held,* that the element of time was annexed to the payment only and not to the gift itself, and that therefore the widow took the $800 as an absolute gift, she herself to determine the character of the needs and the time when payments were necessary to meet them.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is a contest over the construction of the will of George

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William Ohse, who died at the age of seventy-seven leaving a widow, a son, and four daughters, all of adult age. By his will he devised all his property, real and personal, to his son, *William Ohse* (except one cow, which was to go to his wife, Johanna), with the provision that "said *William Ohse* is to pay to the said Johanna Ohse $800, to be paid to her as it becomes necessary for her needs," and also to pay a certain specified sum to each daughter one year after testator's death. Johanna died about six weeks after the testator, having previously made a will bequeathing the $800 to her daughters. Four days before her death she caused to be served on *William* a written notice stating that she was in need of money for her support and demanding that he pay to her the entire sum of $800, but no part of it was paid. The principal facts which are proper to be considered in aid of construction of the will are thus stated by the circuit judge:

"The testator and his wife were Germans. The property left to the son was a farm of 160 acres, sixty-five acres cleared, against which there was a mortgage and debts amounting to about $1,500. The testator died February 13, 1904, aged nearly seventy-seven, and the will was executed a little less than a year prior to his death. The wife died March 22, 1904, aged sixty-three. At the time the will was executed the testator and his wife lived on the farm, the son living with them. The following summer the old people went to the neighboring village of Fenwood, where the mother had a house and five acres of land, the son remaining on the farm. The parents lived together at Fenwood until about December, when the father went to the son's and stayed until his death there. Prior to December the father had spent a part of the time at the son's. The mother remained in the home at Fenwood until the father's death, and after that lived with a daughter in the village until she died. The mother had been in poor health about a year prior to her death. The son had always lived on a farm with the parents. The daughters had lived at home until married, except when working out at domestic service. The son was nearly thirty-five years old at the father's death."

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Upon settlement of the final account of *William Ohse* as executor of the will of George, the respondent *Miller,* as executor of the will of Johanna, appeared and objected to the allowance of the account, and prayed that the will be construed and that the county court require said first-named executor to pay to him said sum of $800. The county court denied the relief asked, and the executor of Johanna's will appealed to the circuit court, which last-named court reversed the judgment of the county court and remanded the case to the county court with directions to require the payment of said sum of $800 to the executor of Johanna's will (less the funeral expenses paid by *William*), and from this judgment *William,* as executor, appeals.

For the appellant there was a brief by *Salter & Jackson* and *Charles F. Grow,* attorneys, and oral argument by *Mr. Grow.*

For the respondent there was a brief by *Brown, Pradt, Genrich & Anderson,* and oral argument by *F. W. Genrich.*

WINSLOW, C. J. Various rules have been laid down by the courts as helpful in the construction of uncertain clauses in wills. None of them are inflexible, however, and all yield to the cardinal rule that the words of a will are to be construed so as to give effect to the intention of the testator, which intention is to be ascertained from the language of the will itself, in the light of the circumstances surrounding the testator at the time of its execution. *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786.

The question here is whether the testator intended to make an absolute gift to his wife of $800, or only to give her such part of the sum as she might need from time to time, and only as fast as it was needed; in other words, whether the gift is vested or contingent. The fact that there are no words of bequest, but only a direction to the son to pay, is a circumstance which makes in favor of the idea that the gift is con-

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tingent only; but this is not at all controlling. The gift will be held to vest, if such appears to have been the testator's intention, even though it be expressed in a mere direction to pay. 30 Am. & Eng. Ency. of Law (2d ed.) 773. The real inquiry is whether the element of time is annexed to the gift itself as a condition precedent or merely to the payment of it, and we think the circuit court rightly held that the intention was to annex the element of time to the payment only. *Patton v. Ludington,* 103 Wis. 629, 646, 79 N. W. 1073. The wife was fourteen years younger than the testator and would naturally be expected to survive him some years. No other substantial provision was made for her in the will, and it is hardly to be expected that the husband would desire to cut her off with a provision that paltry sums should be doled out to her as it was needed to keep her from absolute pauperism. It is very significant that the first clause contains an absolute direction to pay to her $800, while the element of time is contained in a separate clause regulating only the manner of payment, and, furthermore, that no person was appointed to determine what the character of her needs were to be which would make payments necessary, nor when such payments would be necessary, nor how great they should be at any one time. Thus it would seem that she herself was to determine the character of the needs and the time when payments were necessary to meet them. *In re Will of Bouck,* 133 Wis. 161, 111 N. W. 573, 113 N. W. 452.

It seems to us clear that the testator intended an absolute gift, and the judgment, therefore, must be affirmed.

By the Court.—It is so ordered.

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JONES, Respondent, vs. MONSON and wife, Appellants.

December 19, 1908—January 5, 1909.

Pleading: Construction: Conspiracy: Civil liability: Alienation of affections: Husband and wife: Disabilities: Torts: Crimes: Presumption of coercion: Parent and child: Advice to child as to relations with her husband: Appeal and error: Trial: Requests for instructions to jury: Requisites of charge to jury: Burden of proof: "Establish:" Harmless error.

1. In the construction of a pleading for the purpose of determining its effect its allegations should be liberally construed, with a view to substantial justice between the parties.
2. Criticisms of a pleading will not support a challenge for insufficiency if sufficient can be discovered, reasonably, by judicial construction to sustain it. The sole test is, Will the language used permit of a reasonable construction which will sustain the pleading?
3. A complaint, after stating in appropriate language the formation of a conspiracy to injure by depriving plaintiff of the affections and society of his wife, charged that defendants so wrongfully conspiring "did finally acquire, from bad and improper motives and malicious, false insinuations, such influence over plaintiff's said wife, and defendants used such influence to the extent that the love, affections, and respect of plaintiff's said wife for plaintiff had been wholly alienated and destroyed." This was followed by allegations of specific malicious acts for the purpose, as stated, of "forcing and driving plaintiff away from his said wife and child," and so resulting, concluding with the charge "that by carrying out such malicious conspiracy plaintiff has been wrongfully and maliciously deprived of his wife's affections, society, comfort, and assistance." *Held*, that the complaint sufficiently alleged that the wrongful acts were perpetrated pursuant to a wrongful combination, and that such purpose was accomplished.
4. The doctrine that a wife is incapable of being guilty of a wrong jointly with her husband because of the ancient presumption that what a wife does in that regard in her husband's presence, or so near by as to be under his influence, is presumed to be under coercion of his will, so far as it once existed and is not obsolete, relates to a mere rebuttable presumption, not disability.
5. The common-law doctrine undisturbed by statute, that a husband and wife by themselves cannot be guilty of a criminal offense when the gist thereof is conspiracy, does not go to the extent

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of exempting the wife from the consequences of criminal acts in execution of a conspiracy jointly with her husband which are of themselves subjects of criminal prosecution.

6. There is no such thing as a civil action for conspiracy. An action lies for damages caused by acts pursuant to a formed conspiracy, but none for the conspiracy alone.

7. In a civil action for damages for an executed conspiracy the gist of the wrong is the damages. The combination may be of no consequence except as bearing upon the rules of evidence.

8. The alienation of a wife's affections is such a wrong that a husband and wife, accomplishing it by concert of action, may be both liable for the resulting damage.

9. What a father and mother may do in relation to their daughter continuing to reside with her husband, without inference of bad intent arising therefrom, is quite different from what a stranger may safely do as regards such interference.

10. The relations of parent and child in their moral aspects, and legal as well, begin at the inception of the child's life and do not wholly end until life ends, and those relations carry with them certain duties and privileges as to advice and protection and helpfulness in case of need, the observance of which is so natural, so laudable, and so essential to the family happiness and welfare that acts ostensibly promotive thereof are not to be lightly held to have had a wicked purpose for their mainspring.

11. In actions by a husband against a wife's parents for alienating the wife's affections, the true test to be applied to the evidence is: Were the parents in what they did actuated with reasonable parental regard for their child, or were they actuated by unreasonable ill will towards the husband or the wife, as the case may be? If the former and they yet, from the standpoint of a better or the best judgment, were wrong, excusably mistaking the true situation, the resulting injury is *damnum absque injuria.*

12. It is not error to refuse requested instructions applicable to the case which were substantially covered in the general charge.

13. A charge to the jury is not required to contain a discussion of the evidence in connection with the legal propositions applicable thereto.

14. A charge to the jury is not required to state a proposition more than once, nor adopt any particular phrasing of a proposition by counsel.

15. In instructions to the jury it is not advisable to state any legal proposition applicable to the evidence in an argumentative way.

16. In instructing the jury it is not necessary to enlarge upon the importance of a particular proposition in its moral or other aspects.

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17. In an action by a husband for damages caused by an executed conspiracy by the wife's parents to alienate her affections and deprive her husband of her society and assistance, the court instructed the jury that "acts of parents" under the circumstances of the case "are presumed to be in good faith and for the purpose of promoting the child's welfare unless the contrary is established by the evidence." "So that to recover it is not only necessary to establish by a preponderance of the evidence that the parents brought about the" result complained of, "but in so doing they acted maliciously, that is in bad faith, not with a view of promoting the daughter's welfare." "If parents who have knowledge of a child's actual situation act in the honest belief that a course taken or advised is for the child's welfare, their acts cannot be deemed malicious, although such conduct in fact appears detrimental to the child's interests." *Held*, that the language, while rather restrictive, was in favor of the parents and hence not prejudicial.
18. In such instructions the use of the words "knowledge of the child's actual situation," instead of "knowing or reasonably apprehensive of the child's needs," or words of similar import, showing that the parents may advise upon reasonable appearances of necessity therefor as well as upon actual knowledge, if error at all, is error in the parents' favor.
19. In an action by a husband for damages for alienating his wife's affections, declarations of the wife made out of court long after the alleged wrongful act was done are not evidence against the husband, and do not suggest an instruction directing the jury to consider advice or statements made to the wife subsequent to the separation.
20. It is not error as against the defendant to instruct the jury that the burden of proof is on the plaintiff to "*establish* the facts essential to his cause of action by a preponderance or greater weight of evidence."
21. The word "establish," as applied to the quantum of evidence necessary to warrant the existence of a fact in issue, is more appropriate to a criminal than a civil case.
22. Where no punitory damages were awarded by the jury, error in the manner of submitting the question of such damages to the jury was not prejudicial to appellant.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment of $1,608.20 damages and costs to remedy injuries caused by alienating the affections of plaintiff's wife.

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The defendants are husband and wife and parents of plaintiff's wife. Plaintiff's claim was that defendants conspired together with bad intent to deprive plaintiff of his wife's affections and cause her to desert him, and accomplished their purpose by compelling the wife, who with her husband was residing with the defendants and had so resided for a considerable length of time prior to their marriage, to seclude herself and baby girl which had been born to them, from him, and induced her to refuse to speak to him or recognize him as her husband or permit him to pay her or their child any attention and drove him from the house by ill treatment and forbade him to return or come upon the premises, notifying him that the daughter would not go therefrom to live with him.

Defendants answered putting in issue all the allegations of the complaint as to improper treatment of the plaintiff and with bad intent influencing his wife against him.

Upon evidence tending to support the allegations of the complaint the cause was submitted to the jury on the subject of punitory and that of actual damages as well, resulting in a verdict in defendants' favor as to the former but in the plaintiff's favor as to the latter, the damages being assessed at $1,500. Judgment was entered upon the verdict in plaintiff's favor.

Daniel H. Grady, for the appellants.

Henry A. Gunderson, for the respondent.

Marshall, J. The first three assignments of error will be considered together. They involve these subjects: (1) Did the complaint present a case of an executed conspiracy to injure by wrongfully depriving respondent of his wife's affections? (2) Can there be such a conspiracy as between husband and wife? (3) Was there sufficient proof of such a conspiracy as to render evidence of what was said or done by one in the absence of the other admissible against

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both? (4) Was the evidence sufficient to carry the case to the jury on the issue of wrongful intent?

1. No question is raised but that a conspiracy to injure respondent by depriving him of his wife's affections and society was alleged. The infirmity claimed is that the complaint failed to state facts reasonably indicating an execution thereof. In deciding that, the pleading must be tested by the broad liberal rule of the statute that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties." Sec. 2668, Stats. (1898). More and more, as time continues, the beneficent purpose of that statute is appreciated and disposition to give it the broadest scope which can reasonably be done is evinced. It is one of the most significant of the indications found throughout the Code that its builders purposed to sweep away, so far as possible, the technicalities and hindrances of common-law procedure; superseding it by a new system as near the ideal as practicable of a plain, simple, easy method of presenting controversies for judicial treatment and the solution thereof—one that would always give dignity to the substance of things, overlooking mere solvable indefiniteness and nonprejudicial imperfections. In harmony therewith it has been iterated and reiterated that "criticisms of a pleading will not support a challenge for insufficiency . . . if sufficient can be discovered, reasonably, by judicial construction to sustain it." The sole test is, "Will the language used permit of a reasonable construction which will sustain" the pleading? *Emerson v. Nash,* 124 Wis. 369, 380, 102 N. W. 921. Failure to appreciate the force of this rule and the extent of the change wrought by the Code, results in waste of energy of counsel, useless expense to clients and to the public.

The complaint after stating, in appropriate language, the formation of a conspiracy to injure by depriving respondent of the affections and society of his wife, charged that the persons so wrongfully conspiring "did finally acquire, from

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bad and improper motives and malicious, false insinuations, such influence over plaintiff's said wife, and defendants used such influence to the extent that the love, affections, and respect of plaintiff's said wife for plaintiff had been wholly alienated and destroyed." That is followed by allegations of the perpetration of specific malicious acts for the purpose, as stated, of "forcing and driving plaintiff away from his said wife and child," and so resulting, concluding with the charge "that by carrying out such malicious conspiracy . . . plaintiff has been wrongfully and maliciously deprived of his wife's affections, society, comfort, and assistance. . . ." What more is required? We are unable to suggest anything and counsel fails in that regard, except upon the hypothesis that the complaint does not charge that the alleged wrongful acts were done pursuant to a formed conspiracy to accomplish the result reached. True, the complaint might have been more logically framed. After charging the conspiracy to injure by accomplishing what in fact occurred, the pleader might well have then charged that pursuant to such wrongful conspiracy to injure, with specific malicious intent to effect the purpose thereof, certain acts, specifying them, were done with bad intent, closing with a charge as to the consummation of the conspiracy to the plaintiff's damage. But there is no mistaking the purpose of the pleader to state that the wrongful acts were perpetrated pursuant to the wrongful combination, and that the purpose was accomplished. Moreover, it can hardly be said that rules for judicial construction of a pleading need be resorted to for that purpose, as the quotations we have given clearly indicate. But if it were otherwise the rule for testing pleadings for insufficiency, to which we have referred, easily solves the uncertainty. "All facts," as stated in *White v. White,* 132 Wis. 121, 127, 111 N. W. 1116, a case similar to this, "reasonably inferable from those expressly alleged are to be regarded as efficiently pleaded."

2. We are not familiar with the supposed rule counsel con-

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tends for, that a wife is incapable of being guilty of a wrong jointly with her husband because of the ancient presumption that what a wife does in that regard in the husband's presence, or so near by as to be within his influence, is presumed to be under coercion of his will. That doctrine, so far as it once existed and is not obsolete, relates to a mere rebuttable presumption, not disability. *Miller v. State,* 25 Wis. 384; 1 Bishop, New Crim. Law, §§ 356–366.

The common-law doctrine undisturbed by statute, that a husband and wife by themselves cannot be guilty of a criminal offense when the gist thereof is conspiracy, is familiar. 2 Bishop, New Crim. Law, § 187; Wright, Crim. Conspiracies, 221. The basic feature thereof is that a husband and wife are but one, and that since it takes two or more persons to form a conspiracy, the husband and wife alone are incapable thereof but are so when acting with one or more others. That principle by no means goes to the extent of exempting a wife from the consequences of criminal acts in execution of a conspiracy jointly with her husband which are of themselves subjects of criminal prosecution. The parties may be prosecuted jointly with or without any other person being charged, the conspiracy not being the gist of the offense, and both convicted. *State v. Clark,* 9 Houst. (Del.) 536.

The authorities relied upon by the learned counsel and which it seems moved the learned trial court to rule in counsel's favor to the extent of holding that an action for conspiracy will not lie against husband and wife, on the supposition that the complaint in one aspect might be treated as a pleading in an action to remedy such a wrong, are all, so far as any bearing on the question is concerned, criminal cases. There is no such a thing as a civil action for conspiracy. There is an action for damages caused by acts pursuant to a formed conspiracy, but none for the conspiracy alone. When the unlawful combination is the offense, as in criminal prosecutions, then the principle invoked by counsel applies.

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Rex v. Locker, 5 Esp. N. P. 107; *People v. Miller,* 82 Cal. 107, 22 Pac. 934; *State v. Clark, supra; Kirtley v. Deck,* 2 Munf. 10, 15. These and similar cases are pointless as regards the action here. The last citation was a civil case. The husband and wife were charged with others, and the law that they may be so charged notwithstanding the doctrine of unity was passingly referred to as sufficient for the case. Counsel there argued that the principle now insisted on had no application as the gist of the offense was the damage, not the conspiracy. The court passed that question, the suggestion before indicated being deemed sufficient.

In a civil action for damages for an executed conspiracy, as is very familiar, the gist of the wrong is the damages. The combination may be of no consequence except as bearing upon rules of evidence. *Martens v. Reilly,* 109 Wis. 464, 84 N. W. 840; *State ex rel. Durner v. Huegin,* 110 Wis. 189, 255, 85 N. W. 1046; *Randall v. Lonstorf,* 126 Wis. 147, 105 N. W. 663. The circuit court seems to have thought it was necessary to reject from the complaint as surplusage the allegation to the effect that the defendants conspired together with bad intent to accomplish the wrong. Not so, since the action, as before indicated, was not for the conspiracy but for damages on account of the consummation of the purpose of it, the two acting in concert. That would make a criminal offense before reaching the consummation as to persons not under disability, as stated in *Randall v. Lonstorf, supra.* The disability would not militate against capability of the two in concert to wrongfully damage the intended victim and become responsible to him therefor. The rule of evidence, as in any ordinary case of a wrongful act committed pursuant to an agreement to do it, would apply. It is sufficient, if actual damage is the result, for a remediable wrong. In that case whether one or more are concerned may be immaterial to the cause of action, but whether there was a subsidiary agreement by two or more persons to do the act

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consummated by concert of effort may affect the remediable procedure as regards methods of proof. That alienation of a wife's affections is such a wrong does not admit of question.

The foregoing is well supported by authority elsewhere referred to by counsel for respondent. *Price v. Price,* 91 Iowa, 693, 60 N. W. 202; *Young v. Young,* 8 Wash. 81, 35 Pac. 592. Also the following: *Stanley v. Stanley,* 27 Wash. 570, 68 Pac. 187. In each of these instances it was conceded, as it seems, that husband and wife, accomplishing by concert of action deprivation of another of his marital rights, are both liable for the resulting damage.

3, 4. These branches of the case we shall not discuss at length, analyzing and showing the bearing of evidence. It is the opinion of the court that the case is by no means so barren of evidence, either on the subject of concurrence of appellants with bad intent to rob respondent of the affections and society of his wife or that of the accomplishment of such purpose with like intent, as to warrant reversing the trial court in those regards.

We will say in passing in coming to the foregoing conclusion, we have given due consideration to the fact that what a father and mother may do in relation to their daughter continuing to reside with her husband, without inference of bad intent arising therefrom, is quite different from what a stranger may safely do as regards such an interference. True, parents may properly, to some extent, watch over the welfare of a daughter after marriage as well as before. True, they may advise her, under some circumstances, contrary to the inclination of her husband and even to the extent of advising desertion of him and may act upon the mind of the wife successfully to that end from proper motives. Indeed, under some circumstances they might be very derelict in their duty to their daughter if they did not take that extreme course. The relations of a parent and child in their

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moral aspects, and legal as well, begin at the inception of life and do not wholly end until life ends, and those relations carry with them certain duties and privileges as to advice and protection and helpfulness in case of need, the observance of which is so natural and so laudable and so essential to the family happiness and welfare that acts ostensibly promotive thereof are not to be lightly held to have had a wicked purpose for their mainspring. Acts done by a stranger might well be regarded as malicious, while similar acts by the parents would not give rise to a well-grounded suspicion of bad intentions. We fully recognize such to be the case and that the true test to be applied to the evidence in this class of cases is, Were the defendants in what they did actuated with reasonable parental regard for their child, or were they actuated by unreasonable ill will towards the husband or the wife, as the case may be? If the former and they yet, from the standpoint of a better or the best judgment, were wrong, excusably mistaking the true situation, the resulting injury is *damnum absque injuria.* The cases cited to our attention on this line are fully appreciated and the fullest effect the doctrine they declare can reasonably have in reviewing the evidence, it seems has been given thereto. We will preserve here counsel's citations and others: *Holtz v. Dick,* 42 Ohio St. 23; *Oakman v. Belden,* 94 Me. 280, 47 Atl. 553; *Brown v. Brown,* 124 N. C. 19, 32 S. E. 320; *Reed v. Reed,* 6 Ind. App. 317, 33 N. E. 638; *Tucker v. Tucker,* 74 Miss. 93, 19 South. 955; *Burnett v. Burkhead,* 21 Ark. 77; *Williams v. Williams,* 20 Colo. 51, 37 Pac. 614; *Glass v. Bennett,* 89 Tenn. 478, 14 S. W. 1085; *Bennett v. Smith,* 21 Barb. 439; *Smith v. Lyke,* 13 Hun, 204; *Hutcheson v. Peck,* 5 Johns. 196; *Huling v. Huling,* 32 Ill. App. 519; *Tasker v. Stanley,* 153 Mass. 148, 26 N. E. 417; *Fratini v. Caslini,* 66 Vt. 273, 29 Atl. 252; *Higham v. Vanosdol,* 101 Ind. 160; *Campbell v. Carter,* 3 Daly, 165.

Some complaints are made of rulings on evidence, all of

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which have received proper attention without harmful error having been discovered.

Several errors are assigned as to refusals to instruct and imperfections in instructions given. It would unnecessarily extend this opinion to a very great length to discuss them in detail. Therefore, we will not do so, but rest those matters in the main by expressing our opinion that so far as requests were refused, which were applicable to the case, they were substantially covered in the general charge.

Counsel's requests Nos. 3, 5, 7, 9, 10, 14, 15, and 16 all appertain to the right and duty of parents to, in good faith, advise their children for such children's welfare, not being responsible for mistakes, and, as to whether the acts done and expressions indulged in and advice given by appellants were of that character, the jury should consider the conduct of respondent as shown by the evidence and all the evidence bearing thereon. All that was said to the jury in a charge commendable for its conciseness and restraint to the legal questions involved.

A charge to the jury is not required to contain a discussion of the evidence in connection with legal propositions applicable thereto, nor to state any such proposition more than once, nor adopt any particular phrasing of a proposition by counsel, nor is it advisable to state any such proposition in an argumentative way, and, of course, it is not necessary to indulge in enlarging upon the importance of a particular proposition in its moral or other aspects. To present a multitude of requests invoking a trial judge to do such things is counsel's right, but whether it is advisable may, at least, well be doubted if not criticised.

Here, the jury were told that "acts of parents" under the circumstances of this case "are presumed to be in good faith and for the purpose of promoting the child's welfare unless the contrary is established by the evidence." "So that to recover it is not only necessary to establish by a preponder-

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ance of the evidence that the parents brought about the" result complained of, "but in so doing they acted maliciously, that is in bad faith, not with a view of promoting the daughter's welfare." "If parents who have knowledge of a child's actual situation act in the honest belief that a course taken or advised is for the child's welfare, . . . their acts cannot be deemed malicious, although such conduct in fact appears detrimental to the child's interests." In those few words substantially all that was material in the numerous requests we have referred to was given, rather restrictive, however, in favor of appellants, in that the term "knowledge of the child's actual situation" was used, instead of knowing or reasonably apprehensive of the child's needs, or words of similar import, showing that the parents may advise upon reasonable appearances of necessity therefor as well as upon actual knowledge. Thus incidentally we have answered an assignment of error made further along, grounded on the use of the words which we have seen to have been error in appellants' favor, if error at all.

Error is assigned because the court failed to instruct the jury not to consider advice or statements which may have been given or made to the wife subsequent to the separation. No evidence is referred to calling for such an instruction and we have not discovered any. True, counsel cites us to evidence introduced on behalf of appellants of a letter written to respondent's counsel by his wife some over a month after she ceased living with him, to the effect that appellants were not concerned in the separation and that she would not live with respondent on any account, but how her declaration out of court long after the alleged wrongful act was done could be evidence against respondent or suggest the charge requested, especially when introduced in evidence on behalf of the adversaries, is not perceived. At all events, if the jury considered the letter, as we must assume they did, it having been received as competent evidence, they must have disbe-

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lieved it as they found there was no such separation as it suggests but was one produced by malicious connivance of appellants to that end.

Complaint is made because the court charged the jury, in effect, that respondent could recover on account of the loss of the affections and society of his child. We do not find any such instruction. The language referred to by counsel is a part of the court's statement to the jury of respondent's claim. Nowhere is any such element submitted to the jury. Moreover, it was plainly excluded in the instructions as to the elements of damage.

Again, error is assigned that the jury were instructed the burden of proof was on plaintiff to "*establish* the facts essential to his cause of action by a preponderance or greater weight of evidence." The point of attack is at the word "establish," the claim being that its use made the instruction fall short of informing the jury that it was necessary in order to entitle plaintiff to a verdict for them to be satisfied by a preponderance of the evidence of the existence of all the facts essential thereto. The point is not well taken. True, it were better to use the term so often sanctioned by this court, "satisfied by a preponderance of the evidence," or what is still better, in the judgment of the writer, "satisfied to a reasonable certainty by a preponderance of the evidence." *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 529, 60 N. W. 250; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 219, 78 N. W. 442. But the use of the word "establish" was rather putting it too strong as against respondent than otherwise. *Eberhardt v. Sanger,* 51 Wis. 72, 79, 8 N. W. 111; *Knights of Pythias v. Steele,* 107 Tenn. 1, 63 S. W. 1126. In 3 Words & Phrases, 2471, the author, citing these cases, gives as the rule thereof, and quite properly, that the word "establish," as applied to the quantum of evidence necessary to warrant the existence of a fact in issue, is more appropriate to a criminal than a civil case.

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Lastly, complaint is made because the court submitted the question of punitory damages to the jury. Notwithstanding counsel's criticism of the fact and manner of submission we are at a loss to discover any which is well grounded. Moreover, no harm was done, in any event, since no punitory damages were awarded.

All matters referred to in the brief of counsel for appellant, which we have not referred to in some way, have received careful attention, it is thought, resulting in the opinion of the court that the record is free from any harmful error.

By the Court.—Judgment affirmed.

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CASES DETERMINED

AT THE

January Term, 1909.

Voss, Respondent, vs. Northwestern National Life Insurance Company, Appellant.

October 2, 1908—January 26, 1909.

Estoppel: Breach and affirmance of contracts: Mutual insurance contracts: Rescission: Waiver.

1. Where an assured, under a policy of life insurance alleged to have been breached by the passage of a by-law of the mutual company which issued the policy, continues for four years to make payments without objection, he cannot claim the benefits of the alleged breach.
2. Election to take advantage of a breach of a contract must be promptly made.
3. Such rule is peculiarly applicable to mutual insurance contracts, where the insured practically is on both sides of the contract, as insurer and insured.
4. A by-law passed by a mutual life insurance company provided that a certain class of policies, theretofore issued, was re-rated and required to pay a larger premium than specified in the policies. The by-law further required that such increased premium should be paid after a certain date; that the insured might elect to make payments according to the terms of the policy, in which case his policy would be proportionately commuted and his insurance proportionately decreased; and that any policy on which payments were not made as required should become null and void and all payments forfeited. This by-law was passed, obviously in good faith, to maintain the solvency of the company. The insured, and plaintiff the beneficiary, had notice of such purpose and knew the company

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was run on the idea that the by-law was valid. *Held*, that it was their duty, in justice to other members, to seasonably elect whether they would treat the passage of such by-law as a breach of their contract of insurance or not.

5. In such case the question is not one of estoppel, but waiver.
6. A waiver is the voluntary relinquishment of a known right, benefit, or advantage.
7. Voluntary choice is the essence of waiver, and the doctrine of waiver is not necessarily predicated upon estoppel.
8. Where a mutual life insurance company, by the passage of a by-law providing for an increased premium, works a repudiation of its contract with an insured which justifies rescission, the insured cannot continue for four years to stand upon the policy, claiming the benefits of it without paying the increased premium, the company carrying the risk for the full value of the policy, while if rescission had been promptly made the appellant would only be liable for the damages caused by the breach. The insured cannot thus stand on repudiation or no repudiation as best serves his purpose.
9. Where an insured received and for four years retained papers informing him of the corporate action of a mutual life insurance company in which he held a policy, and also informing him of the effect of such action on his policy, he cannot be permitted to say that he did not know the contents of such papers.
10. Where a mutual life insurance company passed a by-law increasing the rates of premiums on existing policies (whether the passage and attempted enforcement thereof was a breach of its contracts of insurance being a point not decided), in an action for damages predicated on such breach it is *held* upon the whole record that both the insured and the beneficiary had waived the right to maintain the action.

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Prior to 1900 Ferdinand Voss, husband of plaintiff, was insured in the Northwestern Mutual Relief Association of Madison, Wisconsin, under a certificate bearing date February 7, 1884, in the sum of $2,000, upon the mutual assessment plan, which policy was carried by him until October 29, 1900. Upon the date last mentioned said Ferdinand Voss

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exchanged his life insurance certificate issued in 1884 for a new policy of insurance in the sum of $2,000 in the Northwestern National Life Insurance Company, of the city of Madison, Wisconsin, bearing the same date as the old certificate, February 7, 1884. This latter policy was issued subject to ch. 270, Laws of 1899, and provided for the payment of a bimonthly premium during the continuance of the policy. The policy, known as No. H 2491, and in which the plaintiff was named as beneficiary, was issued in consideration of the bimonthly premium and the agreements and warranties in the application and the conditions and provisions indorsed thereon, all of which by the terms of the policy were made part of the contract. The conditions on the back of the policy provided, among other things, that it was issued subject to secs. 5, 6, 8, and 9, ch. 270, Laws of 1899, and contained the further provision:

"This policy carries the yearly term reserve at the attained age of the insured according to the combined experience table of mortality and interest at four per cent.; and any lien against or charge upon this policy or any indebtedness of the insured in the company or any unpaid premiums of the current year will be deducted in the settlement of the death benefit under this policy."

The application acknowledged the existence of a lien against the policy in the sum of $167.32.

On August 29, 1901, the defendant was organized to do business on the mutual insurance plan as authorized by ch. 178, Laws of 1901 of the state of Minnesota, and by its articles of incorporation its board of directors was authorized to "make and amend such by-laws as they deemed necessary and adopt rules for its own government." By the terms of these by-laws the defendant had power to "adjust or readjust rates of assessments or premiums of insured members paying a net rate of less than the rate indicated by the table of rates for a policy of the same kind or class based upon the American Experience Table of Mortality and four per cent. interest, at any age or time, so that each member shall be re-

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quired to pay, and shall pay, his equitable share of death claims, expenses, and other liabilities;" and further, "to fix the amount and rate of premiums upon contracts hereafter issued or heretofore issued or assumed by the company, and especially to make such amendments to the by-laws as may be needed to enable the company to carry out contracts heretofore issued or assumed by it." The by-laws further provided that all policies or certificates issued or assumed by the defendant should be construed and governed only by the laws of the state of Minnesota, and that the defendant might reinsure the members of other companies, associations, or societies, issuing thereto its policies or certificates of insurance, and that policies of insurance may be issued in any form not in conflict with the articles of incorporation or the laws of the state of Minnesota.

On the 29th of August, 1901, an agreement was entered into between the old company, known as the Madison or Wisconsin Company, and the defendant, known as the Minnesota Company, by the terms of which it was agreed that the defendant should reinsure the members of the Wisconsin Company upon the terms and conditions provided in such agreement, the defendant being designated in the agreement first party, and the Madison or Wisconsin Company second party. This agreement contained the following clause:

"Now, therefore, the party of the first part for a good and valuable consideration by it received, and in consideration of the execution hereof by the party of the second part and the fulfilment by the party of the second part of the terms and conditions hereof, and upon the terms and conditions herein provided, and not otherwise, doth hereby agree to receive and doth hereby receive into its membership as of this date all of the living members, policy-holders and certificate-holders, of the party of the second part, who upon this day are and by the books of the party of the second part appear to be members thereof in good standing, and such members as may not at present be in good standing, but are entitled to reinstatement and who may hereafter be duly reinstated, and doth hereby assume each and every of the present certificates and

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policies of the party of the second part issued by it, under its present or former name, to and held by such members, subject, however, in each case to the terms and conditions of the particular contract of each member and upon the terms, conditions, stipulations, and agreements herein contained, and not otherwise. . . . And the assuming of each policy or certificate by the party of the first part is expressly subject to the provisions of the articles of incorporation and by-laws of the party of the first part, as the same now exist or as they may hereafter be amended, and also subject to the laws of the state of Minnesota as they now exist or may hereafter be or exist, all whereof constitute and form a part of each certificate and policy hereby assumed."

On September 3, 1901, the defendant sent to the insured the following insurance policy:

"This is to certify that the *Northwestern National Life Insurance Company,* of Minneapolis, Minnesota, did upon the 29th day of August, 1901, by a contract of consolidation or reinsurance receive into its membership as members and did reinsure all living members of the Northwestern Life Insurance Company, of Madison, Wisconsin, who upon said date appeared upon the books of said last-named company to be and who actually were members in good standing thereof, and whereof, including policy H 2491 on the life of Ferdinand Voss, Black Earth, Wisconsin, subject to their several policies or certificates issued by said company at Madison, Wisconsin, and to the terms and conditions of said contract of reinsurance; it being expressly stipulated that all of said contracts are to be construed as contracts of the state of Minnesota and in accordance with the laws of said state, and are assumed subject to the by-laws and articles of incorporation of the reinsuring company as they now are or may hereafter exist, and to the laws of the state of Minnesota, and especially to ch. 178 of the Laws of 1901.

"WILLIAM F. BECHTEL, President.
"FRED J. SACKETT, Secretary.

"Dated September 3, 1901."

At the time of reinsurance with the defendant the insured was paying bimonthly on his "H" policy with the Wisconsin

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Company $6.10, which payment was continued up to June 6, 1907. On November 13, 1902, the defendant passed a by-law by the terms of which it was provided, in substance, that each policy issued by the Northwestern National Life Insurance Company, of Madison, Wisconsin, and designated by said company as an "H" policy, which provided for annual renewable term insurance, requiring payment of an annual, semi-annual, quarterly, or bimonthly premium of a less amount than required by the combined experience table of mortality with four per cent. interest for annual renewable term insurance, was rerated and required to pay a larger premium than specified in the policy, and provided specifically the amounts which should be paid on January 1, 1903, and each year thereafter. The by-law further provided that the insured would be allowed to make payments according to the terms of his policy, but that in such case his policy would be proportionately commuted and his insurance proportionately decreased, and that any policy upon which premium payments were not made as required thereby should become null and void and all payments made thereon forfeited to the defendant; that the adoption of the by-law was for the purpose of perfecting an equitable adjustment of premium payments among the policy-holders and to enable the company to preserve and maintain its standard of solvency and to fully meet its reserve and liability under the law. A table of rates made applicable to each policy was set out in the by-law, and provision made therein for the giving of notice to each policy-holder affected by the by-law. Immediately after the passage of this by-law a printed copy of the same was mailed to the insured and all others of his class, and the insured, Ferdinand Voss, made no objection to it until May, 1907. In January and February, 1903, printed circulars were sent to the insured, giving an explanation of the effect of the by-law and calling attention to the laws of Wisconsin and Minnesota respecting the matter and the duty of the defendant to

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maintain its reserve and the necessity of passing the by-law in order to do the same, and further explaining that the insured had the privilege of paying the rate specified in his policy and having the same scaled down, or the larger rate specified in the notice and by-law. Full explanation was made as to the effect of each payment. The insured received this notice and made no objection, and continued to pay the premium specified in his "H" policy with the Wisconsin Company up to June, 1907. On May 1, 1907, the insured and plaintiff wrote the defendant that their first definite information that the policy was subject to reduction of value was received in a letter written by the company April 2, 1907, in reply to one written on behalf of the insured. They then objected to the by-law, denied its validity, and claimed the contract was rescinded by the passage and attempt to enforce the by-law. Evidence was offered by plaintiff tending to show that the increased rate fixed by the by-law was unreasonable and for that reason the by-law was void. There was also evidence tending to show that the rate fixed by the by-law was not unreasonable or higher than necessary to maintain the solvency of the company. The evidence also shows that the insured had charge of payment of the premiums and attended to all the matters connected with the insurance for the plaintiff and acted as her agent in that regard; that about four fifths of the holders of "H" policies, similar to the one held by the insured, complied with the by-law in question without objection.

This action was brought to recover damages for the alleged breach of the contract of insurance assumed by defendant, alleged to have occurred by the passage of the by-law on November 13, 1902, and the notice of January and February, 1903. The plaintiff alleged in the complaint that she and the insured declared the policy of insurance rescinded and demanded damages, alleged to be $1,082.01. The defendant denied the material allegations of the complaint re-

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specting the alleged breach, and set up that the by-law was regularly and lawfully passed and valid; that the insured and all other policy-holders affected by said by-law had ratified it; that the business of the defendant had been run on the faith of such ratification; that the insured and plaintiff were estopped from objecting to the by-law; and that the insured and plaintiff had failed to pay the premium of June 6, 1907. The court below found that the passage of the by-law in effect rerated the "H" policy issued by the Madison Company to the insured and required a much larger rate than that fixed by the policy; that the premium under such by-law increased from year to year, and that payment at the rate fixed in the policy might be made and the policy proportionately commuted; that after January 1, 1903, the defendant sent to Ferdinand Voss, as each bimonthly payment became due, notice of the amount due under the terms of the by-law; that said Voss continued to pay the premium named in the policy up to and including the payment falling due April 10, 1907; that during April, 1907, Voss was informed by the company that his policy was being commuted under the by-law; that on May 7, 1907, plaintiff and the insured notified defendant that they considered the commuting of the policy a breach, and that they rescinded and demanded the value of the policy as damages. As conclusion of law the court found that plaintiff was entitled to recover $1,110.63 and costs. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there were briefs by *Jones & Schubring,* attorneys, and *John T. Baxter,* of counsel, and oral argument by *B. W. Jones.*

Frank E. Parkinson, for the respondent.

The following opinion was filed November 10, 1908:

KERWIN, J. Several contentions are made by appellant as grounds for reversal, and among others that the court

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erred in failing to find, as requested by defendant, that Ferdinand Voss was the agent of plaintiff in the insurance matters and that he and plaintiff accepted, adopted, and ratified the by-law of November 13, 1902, and elected to pay the premium provided by the policy and have it commuted accordingly. If the foregoing contentions are sustained no others need be considered. There can be no doubt upon the evidence that the insured acted as the agent of the plaintiff in all matters regarding the policy, and further it appears that plaintiff had knowledge of the material facts. The evidence shows that the insured had entire charge of the matters for his wife and that she left everything to her husband, the insured. Conceding, as contended by respondent, that the passage of the by-law constituted a breach or repudiation of the insurance contract assumed by appellant, we approach the question whether the respondent waived the breach, kept the contract alive, and consented to abide by the by-law. The respondent, by bringing suit upon the breach, seeks to avail herself of the benefits of it after standing upon the contract for a period of four years. Counsel contends that in making the payments respondent was standing upon the contract; but that position is not consistent with the present suit, based upon the breach committed four years before. Under the circumstances of the case disclosed by the record the insured knew that the premiums were received under the by-law, which provided for the payment of the lesser premium referred to in the by-law and reduction of the insurance named in the policy proportionately. He therefore could not continue to make payments without objection for four years and then claim the benefit of the alleged breach. To permit this would be to suffer the insured to assume the double role for a period of four years of breach and no breach, as might best serve his or the plaintiff's purpose. That a party cannot affirm the contract and take advantage of the breach at the same time is well settled. *Woodman v. Blue*

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Grass L. Co. 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. If, as claimed by respondent, she was simply performing her contract during the four years she made payments, she cannot now avail herself of the breach occurring four years before, during which time she has kept the contract alive, according to her contention in this court as well as below. *Supreme Council v. Lippincott,* 134 Fed. 824; *Wells v. Hartford M. Co.* 76 Conn. 27, 55 Atl. 599. The election to take advantage of a breach must be promptly made. *Smith v. Georgia L., S. & B. Co.* 113 Ga. 975, 39 S. E. 410; *Kilgore v. Northwest Texas B. E. Asso.* 90 Tex. 139, 37 S. W. 598; *Clymer v. Supreme Council,* 138 Fed. 470; *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. This rule is peculiarly applicable in mutual insurance contracts, where the insured practically is on both sides of the contract, as insurer and insured. In the instant case about four fifths of the policy-holders complied with the by-law. It was passed, obviously in good faith, to maintain the solvency of the company. In fact, the whole scheme, beginning with the contract of consolidation and ending with the passage of the by-law, appears from the record to have been carried out for that purpose. The insured and respondent had notice of such purpose, knew the company was run on the idea that the by-law was valid, and it was their duty, in justice to other members of the defendant mutual company, to seasonably elect whether they would treat the passage of the by-law a breach or not. *Borgards v. Farmers' Mut. Ins. Co.* 79 Mich. 440, 44 N. W. 856; *Evans v. Southern T. M. R. Asso.* 76 App. Div. 151, 78 N. Y. Supp. 611; *Reynolds v. Supreme Council,* 192 Mass. 150, 78 N. E. 129; *Pain v. Société St. Jean Baptiste,* 172 Mass. 319, 52 N. E. 502; *Smith v. Georgia L., S. & B. Co.* 113 Ga. 975, 39 S. E. 410; *Kilgore v. Northwest Texas B. E. Asso.* 90 Tex. 139, 37 S. W. 600; *Supreme Council v. Lippincott,* 134 Fed. 824; *Foss-Schneider B. Co. v. Bullock,* 59 Fed. 83.

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It is insisted by attorney for respondent that the appellant was not prejudiced by the delay in failing to rescind, and he bases his contention upon the doctrine of estoppel. Here the question is not one of estoppel, but waiver. And while there is considerable confusion in the books respecting the use of these terms indiscriminately, there is a wide difference in their meaning in the law as ordinarily applied. A waiver is the voluntary relinquishment of a known right, benefit, or advantage. *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563; *Stewart v. Crosby,* 50 Me. 130; *Cowenhoven v. Ball,* 118 N. Y. 231, 23 N. E. 470. Voluntary choice is the essence of waiver, and the doctrine of waiver is not necessarily predicated upon estoppel. *Dailey v. Kennedy,* 64 Mich. 208, 31 N. W. 125; *Cassimus Bros. v. Scottish U. & N. Ins. Co.* 135 Ala. 256, 33 South. 163; *Pabst B. Co. v. Milwaukee, supra.* But if we were to apply the principles of estoppel to the case in hand we think the respondent could not escape. Assuming, as insisted by respondent, that there was a repudiation in November, 1902, which justified rescission, the insured and the plaintiff continued to stand upon the policy of insurance, claiming the benefits of it without paying the increased premium, while the appellant was carrying the risk for the full value of the policy, while if rescission had been promptly made the appellant would only be liable for the damages caused by the breach. In other words, upon the respondent's theory the plaintiff could, during the four years which elapsed between the date of the alleged repudiation and the commencement of this action, have stood on repudiation or no repudiation as best served her purpose. We cannot assent to such a proposition. *Supreme Council v. Lippincott,* 134 Fed. 824; *Clymer v. Supreme Council,* 138 Fed. 470.

Point is made by respondent that the insured or plaintiff did not have knowledge of the effect of the by-law until 1907. This position upon the record is clearly untenable. It is

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not denied but that the insured received a copy of the by-law and the letters referred to in the statement of facts in 1903, and also received notices as premiums became due, stating amounts, receiving one in February, 1903. These papers informed the insured fully of the increase in premiums and the effect of paying the rate mentioned in the policy as well as the larger rate. The insured also received and retained the policy of reinsurance. He cannot be permitted to say that he did not know the contents of these papers. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Kruse v. Koelzer,* 124 Wis. 536, 102 N. W. 1072. Counsel for respondent cites over 400 authorities, some of which he frankly admits he has not examined. We have spent much time and labor upon them. Those strongest in support of the position of counsel for respondent on the question upon which the case turns are *Williams v. Supreme Council,* 80 App. Div. 402, 80 N. Y. Supp. 713, and *Smith v. Supreme Council,* 94 App. Div. 357, 88 N. Y. Supp. 44. In the first case there was clearly no waiver. The premium was paid under protest, the insured standing upon the policy as originally made. Besides, there was a flat reduction in the amount of the benefit from $5,000, as provided in the policy, to $2,000. In the latter case (*Smith v. Supreme Council, supra*) there was a similar cut, and the action was brought upon the policy after death of the insured. It also appears, as stated in the opinion, that the insured did not have knowledge of the change and hence there could be no acquiescence or ratification, and that, since he had no notice of the change, his contract rights could not be affected by it on the theory of acquiescence, ratification, or estoppel. Moreover, the opinion is in direct conflict with *Evans v. Southern T. M. R. Asso.* 76 App. Div. 151, 78 N. Y. Supp. 611.

We do not decide whether the passage and attempted enforcement of the by-law was a breach of the contract; but, as-

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suming that it was, we are convinced upon the whole record that the plaintiff and insured waived the right to maintain an action because of such breach, and therefore the judgment must be reversed.

By the Court.—The judgment below is reversed, and the action remanded with instructions to render judgment for defendant dismissing the action.

BARNES, J. (*dissenting*). Under the contract of insurance involved in this case the insured was obliged to make periodical payments of the stipulated premium under penalty of having his contract rights forfeited. The payment of these premiums was entirely consistent with a determination on the part of the insured to stand on the contract obligation and insist that the insurer abide thereby. The insured was entitled to proceed to carry out his part of the contract, and might well ignore the arbitrary and impudent assumption, on the part of the insurer, of the right to relieve itself of two thirds of its contract obligation by going through the formula of passing a by-law to that effect. The obligation of a contract is not so easily disposed of. If it could be, there would be little stability to such obligations. As was well said by the Pennsylvania court in *Becker v. Berlin Ben. Soc.* 144 Pa. St. 232, 22 Atl. 699, the passing of the alleged by-law "was certainly an easy mode of relieving the society of an obligation, and, if successful, will doubtless be followed by other similar associations. The difficulty in the way of this convenient mode of paying debts is that it is repudiation pure and simple." To the same effect are *Covenant Mut. L. Asso. v. Kentner,* 188 Ill. 431, 442, 58 N. E. 966; *Becker v. Farmers' Mut. Ins. Co.* 48 Mich. 610, 12 N. W. 874; and *People v. Empire Mut. L. Ins. Co.* 92 N. Y. 105.

The ability or inability on the part of the insurer to carry out its contracts is immaterial. Whether it would be wise

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or unwise for the policy-holders to insist on their rights is beside the question. The courts are not making contracts for parties. If the insurance company could induce the policy-holders to surrender the contracts which they held and accept others in lieu thereof, it was within its province to do so. If it could not, then it should take the route traveled by other insolvents. It could not, without the consent of the insured, assume to substitute an entirely different obligation on its part from that which it was bound under the contract to meet. To say that a party may deprive himself of two thirds of the benefit of his contract without consideration, by carrying out his part of it and by simply disregarding an unwarranted attempt on the part of the insurer to foist another contract on him, is carrying the doctrine of waiver away beyond where I think it should be carried. The insurer has not been misled to its detriment, and had no right to assume, in the absence of express consent by the insured, that any such proposition would be agreed to.

If A. writes B. that the latter owes him $1,000 and B. ignores the letter, in a suit brought to recover such sum, by most courts the fact of writing the letter, and of failure to reply, could not be shown in evidence. In some jurisdictions such facts might be shown as tending to establish an admission; but the evidence at best, if receivable at all, would be very weak. Jones, Ev. § 583 (590); 2 Wigmore, Ev. § 1073. Here, it seeems, the same facts are not only admissible as tending to show assent or ratification, but the evidence is held conclusive. What, at best, is only held to be inconclusive evidence of a weak and unsatisfactory character of an evidentiary fact, is here decided to conclusively establish a waiver.

Neither do I think there is any justification for construing a contract made by a mutual life insurance company differently from a contract made by a stock company engaged in the life insurance business. Considering the purposes for which this class of contracts are made, stability above all

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things is desirable. In my judgment it is neither just to the insured nor expedient for the insurer that such contracts should rest in uncertainty. The holder of a policy in a mutual life insurance company should feel that his contract is just as inviolable as that made with any other insurer. The volume of this class of business is too large to be jeopardized by anything bordering on a lax construction of such contracts. The authorities do not recognize any such distinction. *Ins. Co. v. Connor,* 17 Pa. St. 136; *Covenant Mut. L. Asso. v. Kentner,* 188 Ill. 431, 58 N. E. 966; *Becker v. Farmers' Mut. F. Ins. Co.* 48 Mich. 610, 12 N. W. 874; *People v. Security Life Ins. & A. Co.* 78 N. Y. 114, 125.

A motion for a rehearing was denied January 26, 1909.

RAHLES, Respondent, vs. J. THOMPSON & SONS MANUFACTURING COMPANY, Appellant.

October 22, 1908—January 26, 1909.

Pleading: Amendment on trial: Continuance: Discretion: Argument of counsel: Master and servant: Negligence: Injuries to servant: Inexperienced servant: Failure to instruct or warn: Obvious dangers: Appeal and error: Review: Appearance and manner of witnesses: Attorneys: Disrespectful arguments.

1. In an action for personal injuries the defendant's negligence, by the allegations of the complaint, was predicated upon defects in the machine in which plaintiff was injured. On the trial no defect in the machine was shown, and at the close of plaintiff's evidence, defendant having moved that the plaintiff be nonsuited, plaintiff asked leave to amend his complaint, presenting an amended complaint, which was the same as the original complaint except that therein the negligence of defendant was predicated upon the ignorance and inexperience of the plaintiff, known to the defendant, and the failure of the defendant to instruct or warn the plaintiff before or at the time of placing plaintiff to work. *Held,* that it was proper to allow such amendment on the trial and there was no error in such ruling.
2. In such case it is not error to refuse a continuance of the case

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over the term, where there is no showing, either by an affidavit or by a statement to the court based on the pleadings apparently supporting such statement, that the defendant was unprepared to meet and could not, with the evidence at hand or available, meet the issues raised by the amended complaint.

3. The terms on which amendment of pleadings during the trial, which bring about no radical change of the issues, may be allowed, are in the discretion of the court.

4. Error assigned to arguments of counsel, stated in the opinion, is *held* to be too critical.

5. In an action by an adult servant for personal injuries, alleged to have followed upon the failure of the master to instruct and warn the plaintiff before or at the time of placing him to work, under the evidence, stated in the opinion, it is *held* that the master was justified in presuming that the servant was an inexperienced adult of ordinary intelligence, and hence that his duty to instruct or warn was only that which the law imposed upon him with respect to any ordinarily intelligent but inexperienced adult servant.

6. In an action by a servant for personal injuries, alleged to have been caused by the servant's coming in contact with a treadle and thereby releasing a drop hammer under which the servant was at work with his hands, the negligence of defendant was predicated on failure to warn or instruct the plaintiff before or at the time of placing him at work. The servant was of ordinary intelligence but inexperienced. *Held*, that the master was not by law required to explain or instruct against such obvious danger, nor with reference to such obvious function of the treadle, nor to anticipate that the servant was ignorant of the existence, or of the function, of the treadle of such a machine which the servant could plainly see in operation.

7. In such case it is *held* that no negligence of the master causing the injury complained of was shown by his omission to caution or instruct the servant.

8. While the appearance and manner of a witness is of importance in the consideration of the issue as to the intelligence of a party when taken in connection with other evidence affecting his credibility or his physical or mental condition, yet standing alone, or existing in connection with evidence which *prima facie* shows ordinary intelligence, appearance and manner alone cannot be invoked to sustain a verdict based on a conclusion that the party was not of ordinary intelligence.

9. Language of counsel in a brief for a rehearing, stated in the opinion, is *held* disrespectful and in violation of Supreme Court Rule 51.

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APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Charles A. Vilas,* attorney, and *Robert N. McMynn,* of counsel, and oral argument by *Mr. McMynn.*

Among other references upon the part of the appellant were the following: *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809; *Malloy v. C. & N. W. R. Co.* 109 Wis. 29, 85 N. W. 130; *Meisenheimer v. Kellogg,* 106 Wis. 30, 81 N. W. 1033; *Cole v. C. & N. W. R. Co.* 71 Wis. 114, 37 N. W. 84; *Wagner v. Plano Mfg. Co.* 110 Wis. 48, 85 N. W. 643; *Dougherty v. West Sup. I. & S. Co.* 88 Wis. 343, 60 N. W. 274; *Dahlke v. Ill. S. Co.* 100 Wis. 431, 76 N. W. 362; *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35, 107 N. W. 289; *Grams v. C. Reiss C. Co.* 125 Wis. 1, 102 N. W. 586; *Stutz v. Armour,* 84 Wis. 623, 54 N. W. 1000; *Ralph v. C. & N. W. R. Co.* 32 Wis. 177; *Sobey v. Thomas,* 39 Wis. 317; *Hinton v. Cream City R. Co.* 65 Wis. 323, 27 N. W. 147; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041.

For the respondent there was a brief by *John L. Fisher,* attorney, and *O. A. Oestreich,* of counsel, and oral argument by *Mr. Oestreich.*

Among other references upon the part of the respondent were the following: Sec. 2669, Stats. (1898); *Hopkins v. C., M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330; sec. 2830, Stats. (1898); ch. 307, Laws of 1899; *McIlquham v. Barber,* 83 Wis. 500, 53 N. W. 902; *Johnson v. Ashland W. Co.* 71 Wis. 553, 37 N. W. 823; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Wolski v. Knapp-Stout & Co. Co.* 90 Wis. 178, 63 N. W. 87; *Neilon v. Marinette & M. P. Co.* 75 Wis. 579, 44 N. W. 772; *Nadau v. White River L. Co.* 76 Wis. 120, 43 N. W. 1135; *Yess v. Chicago B. Co.* 124 Wis. 406, 102 N. W. 932; *Gussart v. Greenleaf S. Co.* 134

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Wis. 418, 114 N. W. 799; *Dwyer v. Am. Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Wysocki v. Wis. L. I. & C. Co.* 121 Wis. 96, 98 N. W. 950; *McMahon v. Ida M. Co.* 95 Wis. 308, 70 N. W. 478; *Thompson v. C., M. & St. P. R. Co.* 14 Fed. 564; *Walker v. Simmons Mfg. Co.* 131 Wis. 542, 111 N. W. 694; *Friemark v. Rosenkrans,* 81 Wis. 359, 51 N. W. 557.

The following opinion was filed November 10, 1908:

TIMLIN, J. The original complaint was quite inartistic. But after setting forth the age, nationality, and occupation of the plaintiff and his lack of knowledge of the English language and the corporate character and the business of the defendant, it averred lack of knowledge of machinery and of the dangers attending its operation and lack of experience on the part of the plaintiff. Defendant had and used a described drop hammer, out of repair and defective. Defendant, knowing the plaintiff's want of experience, and without instructing the plaintiff concerning his duties except as specified, and without warning the plaintiff that there was any danger in working about the drop hammer or that it was liable to fall, ordered the plaintiff to assist the operator of the drop hammer. Plaintiff, assisting without knowledge of the danger, was injured by the hammer dropping upon his hand, which in consequence of this injury was amputated. That if the said defendant by its officers or agents, its superintendent and foreman acting as vice-principals, had warned or in any manner instructed the plaintiff as to the dangers and the use of the said hammer, the precautions to be taken about the same, plaintiff would not have been injured in any manner and would have avoided the said injury. Again:

"That the cause of the injury to this plaintiff was the neglect of the said defendant . . . to warn the said plaintiff of the dangers and of the dangerous condition of the said machine."

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No defect in the machine having been shown, but the evidence on the part of the plaintiff tending to show that the plaintiff accidentally stepped on the treadle of the drop hammer while having his hand in the path of the descending hammer, the defendant at the close of the plaintiff's evidence moved that the plaintiff be nonsuited. Plaintiff then asked leave to amend his complaint, presenting an amended complaint, which is the same as the original complaint except that therein the negligence of the defendant was predicated, not upon any defect in the machine, but upon the ignorance and inexperience of the plaintiff, known to the defendant, and the failure of the defendant to instruct or warn the plaintiff before or at the time of placing plaintiff to work upon the drop hammer. The court allowed this amended complaint to be filed, whereupon counsel for the defendant asked for the "continuance of the case over the term, the immediate taxing by the clerk of this court of the taxable disbursements of the defendant down to this time, and the usual attorney fee of $25. By the Court: The motion is granted upon the sole ground that $10 costs be paid forthwith." Exception to this ruling was taken, and error is assigned on this ruling.

We perceive no error in the ruling. It was proper to allow the amendment on the trial. *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55. Where the complaint is amended on the trial, in order to entitle the defendant to a continuance he must make a showing, if not by affidavit, at least by a statement to the court based on the pleadings apparently supporting such statement, that he is unprepared to meet and cannot, with the evidence at hand or available, meet the issues raised by the amended complaint. *Withee v. Simon,* 104 Wis. 116, 80 N. W. 77. The amendment here brought about no radical change of the issues and the terms were in the discretion of the court. *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 82 N. W. 534; *McIlquham v. Barber,* 83 Wis. 500, 53 N. W. 902; *Pellage v. Pellage,* 32 Wis. 136, 141; *Schaller*

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v. C. & N. W. R. Co. 97 Wis. 31, 71 N. W. 1042. Neither do we think there was error in the rulings relative to the argument made to the jury by plaintiff's attorney. The attorneys for defendant seem to have been quite critical in this regard. It is too much to expect that in extemporaneous argument to a jury rules of law will always be accurately understood and precisely stated by the speaker, and it is much easier to be critical of, than to be correct in, such statements. All the other errors assigned go to one point, namely: Was there a duty resting upon defendant to warn the plaintiff of the danger of stepping upon or coming in contact with the treadle or pointing out to the plaintiff the treadle and its function and the consequence of pressing down thereon?

The plaintiff was a man grown, twenty-four or twenty-five years of age, a Lithuanian by birth, having little or no knowledge of the English language, and had resided in this country four years, and worked at trucking in the shop in question for about a month prior to his injury. This work included bringing material to this drop hammer and leaving it there to be pressed into shape by the operator of the drop hammer. He had also worked at the back of the drop hammer cleaning up the dies on the afternoon of Saturday and for an hour or two on Monday morning up to the time he was hurt. His place of work was at the back of the drop hammer, and had he remained there he would not have come in contact with the treadle; but he testifies that he was directed to also do such work as he might be directed to do by the operator; that a small piece of iron used in wedging or adjusting the die fell out, as it had done several times before, and that at request of the operator he went around from the back to the front of the drop hammer, put his hand under the upraised hammer to insert this small piece of iron, and while so engaged, with his hand in this position, his foot probably came in contact with the treadle, which caused the hammer to drop on his hand. The treadle was a long bar about four inches from the floor, extending in front of the anvil and

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about three inches beyond at each end, and of course was very conspicuous.

The plaintiff was entitled to the rights and subject to the duties of any other adult man. We cannot presume that because he was born in a foreign country, resided in this country only four years and could not speak English, and was illiterate, he did not possess ordinary common sense and shrewdness or that he falls within the legal rules applicable to children. The employer was therefore justified in presuming the plaintiff to be an inexperienced adult of ordinary intelligence. The duty of the employer to instruct or warn such person was only that which the rules of law impose upon him with respect to any ordinarily intelligent but inexperienced adult servant. This rule has been stated affirmatively as follows:

"The duty of informing the inexperienced employee of the dangers ordinarily incident to the service is upon the employer." *Wolski v. Knapp-Stout & Co. Co.* 90 Wis. 178, 63 N. W. 87.

"If a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them and do his work safely, with proper care on his part." *Jones v. Florence M. Co.* 66 Wis. 268, 28 N. W. 207.

The rule as laid down broadly for this state in the foregoing cases is much more favorable to the injured employee than the rule on the subject derived from decisions elsewhere. 1 Labatt, Mast. & Serv. ch. 16. Negatively it has been said:

"Warning is not required against obvious dangers in ordinary operations which are matters of common knowledge to

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all." *Wagner v. Plano Mfg. Co.* 110 Wis. 48, 85 N. W. 643.

"The duty to instruct as between master and servant does not exist as to dangers which are so obvious that the servant must be held as matter of law to be as familiar with them as the master." *Groth v. Thomann.* 110 Wis. 488, 86 N. W. 178.

The master, in order to charge him with this duty, must have known, or ought in the exercise of reasonable care to have known, of the inexperience or lack of knowledge of the servant, and also of the dangerous character of the work. *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Sherman v. Menominee R. L. Co.* 77 Wis. 14, 45 N. W. 1079. The adult employee is presumed to understand the ordinary risks of his employment. *Nash v. C., M. & St. P. R. Co.* 95 Wis. 327, 70 N. W. 293.

"Failure to instruct or warn an employee as to the risks and hazards attending the employment is not negligence, unless the employer knew, or ought to have known, that such warning and instruction was necessary." *Sladky v. Marinette L. Co.* 107 Wis. 250, 83 N. W. 514.

Again:

"The duty to instruct does not go so far as to require the master to acquaint the employee with every possible danger to which he may be subjected in the course of his employment. The master has a right to assume that the servant will see and appreciate those dangers which are open and obvious to a person of ordinary comprehension." *Dahlke v. Ill. S. Co.* 100 Wis. 431, 76 N. W. 362.

To the same effect, *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 62 N. W. 527.

Applying these rules to the case in hand, it is apparent that the defendant had a right to believe that the plaintiff needed no more instruction than any other adult inexperienced person of ordinary intelligence. In the employment and setting to work of such person it would be impossible for the employer to forecast all that might thereafter happen by

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reason of accidental contact with machinery which the employee might be occasionally required to approach. Neither can the employer be expected to take the employee through the shop and explain to him the name and obvious function of every piece of machinery like a treadle. Even in agricultural labor, which is by many considered the simplest form of employment, it would require days of tuition to thus explain and instruct regarding every implement and device used or with which the employee might occasionally come in contact, from a cream separator to a threshing machine. The fact that a certain device attached to a drop hammer was a treadle, and that when pressed downward it would release the uplifted hammer, was so obvious and apparent to any person of ordinary intelligence that the omission to instruct, warn, or explain to one not expected to operate that machine or employed for that purpose could not be considered negligence. If this were an omission of duty on the part of the master, it would be hard to say where instruction should stop and what it should include.

The instant case, in its aspect most favorable to the plaintiff, is that the employer directed an adult ordinarily intelligent but inexperienced man to work at the back of the drop hammer cleaning off the dies and anvil, and also to obey the orders of the operator in front of the drop hammer when requested by the latter. The employer failed to instruct the plaintiff as to the identity or the function of the treadle or as to the danger of pressing down upon or coming in contact with the treadle. The plaintiff was called to the front of the drop hammer by the operator of the drop hammer, and while there accidentally touched the treadle with his foot while his hand was under the uplifted hammer, and in this way was injured. The employer was not by law required to explain or instruct against such obvious danger nor with reference to such obvious function of the treadle, nor to anticipate that the servant was ignorant of the existence or of

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the function of the treadle of such a machine which the servant could plainly see in operation, nor was the employer bound to forecast the possibility of the servant coming around to the front of the machine and accidentally pressing upon the treadle with his foot while his hand was under the uplifted hammer and warn against the consequences. We are convinced that under well-settled rules of law no negligence of the master causing the injury complained of was shown by his omission to caution or instruct the plaintiff in any of the foregoing particulars, and that consequently the judgment should be reversed.

By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the complaint.

The following opinion was filed January 26, 1909:

TIMLIN, J. The respondent moves for a rehearing, on the ground that this court erred in holding that upon the issues made by the pleadings, and evidence in support thereof, the respondent was a person of ordinary intelligence, and also in holding that the appellant was authorized to treat the respondent as such person. Excerpts from the testimony of the respondent given through an interpreter are presented, together with the fact that the respondent worked for the appellant at common labor for two months before he was set to work at the back of the drop hammer, and we are reminded that the trial court and the jury had the advantage of seeing the respondent and hearing him testify.

We have considered these points and find no reason to alter the former decision. Taking the testimony of the respondent all together there is to our minds nothing in it to indicate that he was not of ordinary intelligence. He stumbled in some answers, whether by reason of the difficulty of rapid and extemporaneous translation into English by the interpreter, or otherwise, we cannot say; but in any event not

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more than hundreds of witnesses of ordinary intelligence do in the numerous records which it is part of our duty to examine. The fact that the trial court heard and saw the witness cannot in such case change our view of the legal effect of the testimony, for we are unwilling to establish a rule that would permit the jury upon the same evidence to give damages to one man and withhold damages from another upon their conclusion from his personal appearance. The appearance and manner of the witness is of importance in the consideration of questions of fact taken in connection with other evidence affecting his credibility or his physical or mental condition. But standing alone, or existing in connection with evidence which *prima facie* shows ordinary intelligence, this consideration cannot be invoked to uphold a verdict. But with reference to those persons who require instruction concerning the dangers incident to their work, we notice that there is appended to this brief the name of the same counsel who signed the brief for rehearing in *Lynch v. Ryan,* 132 Wis. 271, 111 N. W. 707, referred to in the opinion upon rehearing, found on pages 277 and 280 (112 N. W. 427).

In the brief of the respondent for rehearing in the instant case we find such expressions as:

"The court deals with the plaintiff as a man made on paper, and in so doing ignores his own positive testimony that he knew nothing of the operation of the machine or the function of the treadle." "There is no escape from the decision that the finding of the jury of this fact is supported by some credible evidence, except as a preconceived notion of the general merits of the litigation be permitted to control the decision." "This court must determine the question under an entirely different rule. It should not utterly disregard the jury's findings, and by assuming the existence of a fact substitute one of its own, as appears to have been done in this case." "We submit that this decision is unwarranted usurpation by the court of the function of the jury. This court should not, through a process of designating questions of fact as questions of law, under the guise of correcting errors of law, practically abolish trial by jury in personal injury cases where the gist of the action is negligence."

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The counsel for respondent is instructed that this language is in violation of Rule 51 of this court, and that further violations of this rule on his part will not be overlooked. Every person who aspires to practice law should be able to distinguish between argument and mere scolding. Argument is a connected discourse based upon reason; a course of reasoning tending and intended to establish a position and to induce belief. Scolding is mere clamor, railing, personal reproof. Argument dignifies the orator and instructs and convinces the auditor. Scolding relieves somewhat the hysteria of the scolder, but only amuses or irritates the hearer. Argument is the professional weapon of the lawyer; scolding that of the *communis rixatrix*. Argument is enjoyed and welcomed in a brief for rehearing; scolding has no proper place therein.

By the Court.—The motion for rehearing is denied, with $25 costs.

City of Eau Claire, Respondent, vs. Eau Claire Water Company and another, Appellants.

December 17, 1908—January 26, 1909.

Arbitration and award: Conclusiveness of award: Validity of award: Presumptions: Setting aside: Questions submitted: Power of arbitrators: Evidence: Witnesses: Impeachment of award: Admissibility of testimony of arbitrators: Values: Municipal corporations: Acquiring waterworks plant: Ordinance-contracts: Notice to assignees of owner of franchise: Waiver: Tender: Indebtedness of municipalities: Constitutional limit: Offsets: Vendor and purchaser: Failure to convey: Rights and duties of vendor and vendee as to profits and interest.

1. Where the written award of arbitrators is directly responsive to the one question submitted, What is the value of a waterworks plant? and declares that the arbitrators have ascertained and fixed the value of such property, upon its face the award is as final and conclusive between the parties as the

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judgment of any other tribunal having jurisdiction to decide such question, not excepting a court of law or equity.

2. Every presumption is in favor of such an award, and its invalidity must be shown, by any one asserting it, by clear and satisfactory evidence.

3. On an arbitration, all questions of judgment within the submission are concluded by the decision of the arbitrators, and are not subject to appeal and review by the court.

4. Under a submission to arbitration of the single question, What is the value of a waterworks plant? the arbitrators have plenary power to decide questions of admissibility, competency, and weight of evidence.

5. Arbitrators are competent witnesses before themselves, are not excluded from the use of their own expert knowledge, and are not confined to testimony from witnesses under oath.

6. The testimony of arbitrators as to what transpired in the hearing and deliberation will not be received to impeach their award.

7. The question of value is illusive, and a fact that may be controlling and significant with reference to one class of property, or under certain circumstances, sinks into comparative insignificance under others, and every element or consideration varies in its influence according to the judgment and experience of the person who is to decide on a value as between buyer and seller; hence it is improper to permit an attack upon an award of arbitrators upon an intricate question of value by attempting to review their mental processes as imperfectly disclosed by them on cross-examination.

8. On review of an award by arbitrators to whom was submitted the single question of the value of a waterworks plant, under the evidence, stated in the opinion, it is *held* that no such glaring undervaluation was shown as to convict the arbitrators of arbitrary or fraudulent action.

9. In proceedings by a city to exercise a right to acquire a waterworks plant owned and operated under an ordinance-contract granting the franchise therefor, which provided, in case the city should exercise a reserved option to purchase, that all assigns of the original grantee should be effectively notified by giving notice to the chief officer in charge of the waterworks, the contract provision is *held* reasonable and notice so served binding on all claiming an interest under the original grantee.

10. In such case, on an arbitration as to values, a mere lienholder is not entitled to notice of the daily hearings before the arbitrators, but in view of the record, if such notice was neces-

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sary, it is *held* to have been waived, as well as any defect in the preliminaries to the selection of the arbitrators.

11. A contract-ordinance, whereby a city granted a water company the right to construct a waterworks system, is *held* to be reasonable and not open to the objection that it cannot be specifically enforced because the city therein reserved the right to purchase, without a corresponding right in the water company to enforce a sale.

12. An ordinance-contract providing for the method of a city's acquiring a waterworks plant required that, to the extent of any outstanding bonds, the purchase price should be paid to the trustees for such bonds, otherwise the payment to be made to the holder of the title. The required amount was tendered to the holder of the title, through its officers in the state, accompanied by merely a request that a release of a recorded mortgage be secured, the city having no means of knowledge as to the amount of indebtedness secured by the mortgage. Then, for the first time, the city received information, binding upon the water company, that the amount of the indebtedness exceeded the purchase price, and consequently that the whole purchase price was by the terms of the ordinance-contract payable to the trustee in the mortgage. *Held*, that an actual, manual tender thereafter made to the trustee was sufficient.

[13. Where an ordinance-contract provided that the municipality could take over a waterworks plant from the water company to which the franchise for its construction and maintenance was granted, on the payment of a valuation fixed under the provision of such ordinance-contract, whether the water company can raise objection that the amount of the valuation so fixed brought the indebtedness of the municipality above the constitutional limit of five per cent. on its assessed valuation, when the actual money was in the possession of the municipality and was tendered to the water company and its mortgagee, not decided.]

14. In determining whether the amount of the indebtedness of a municipality will exceed the constitutional limitation of five per cent. on its assessed valuation, the following items are *held* proper offsets to its present or prospective amount of indebtedness: (1) a sinking fund accumulated against outstanding municipal bonds; (2) the amount of the general fund then in the treasury; (3) a credit fund consisting of certain special assessments for pavements, sewers, and sidewalks, levied in definite amounts upon specific parcels of property, drawing interest, although payable in annual instalments.

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[15. Whether sums which had been contributed by subscribers for proposed nonliability bonds to be issued upon the security of such waterworks after the same should be acquired can be considered as an asset in reduction of such constitutional limit, not determined.]

16. Where one who is under a legal duty to convey property to another, wrongfully, though in good faith, refuses to do so, a court of equity will treat the property as belonging to the grantee after the time at which it ought to have been transferred, and will treat the wrongdoer as a trustee thereof for the purchaser's benefit, liable to account at least for the profits actually received.

17. In such case, if the grantee has enjoyed the use of the purchase money, or, indeed, has by his act deprived the grantor of such use, the grantor's duty to account for profits should be abated to that extent.

18. In such case, where the purchase money has been tendered, and has been so appropriated to the purposes of the tender that the purchaser has received no benefit therefrom meanwhile, and the failure of the seller to receive it and enjoy its use is due wholly to his own fault, the loss of interest which such money might have earned if put to use should not fall upon the purchaser.

19. Where a municipality, after having made an actual and manual tender of money on its indebtedness, sets apart and appropriates the money to the debt, and places it in the hands of its treasurer as a special fund which the debtor can receive at any time, it is such compliance with the rules governing tender as to be effective to stop interest.

APPEAL from a judgment of the circuit court for Eau Claire county: A. J. VINJE, Judge. *Affirmed.*

The city of *Eau Claire,* in preparation for establishing municipal waterworks, had acquired certain real estate and other property, together with easements and privileges, including a right to water power for the purpose of operating pumps delivered to it at its water wheels. In 1885 it entered into an ordinance-contract with Fairbanks, Morse & Co., whereby a franchise was granted to operate waterworks and charge certain rates to private consumers, the city agreeing to pay a specified hydrant rental. The city turned over to Fairbanks, Morse & Co. its said property, easements, and rights, inclu-

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sive of the contract for power, and the latter contracted to build and maintain waterworks under various specifications. That ordinance or contract contained the following:

"This ordinance is passed upon the express condition and reservation that the city of *Eau Claire* reserve to itself the right to acquire of the said grantees, their heirs and assigns, the said waterworks, and all lands, machinery, pipes, mains, hydrants and appurtenances thereto belonging, and the said grantees, their heirs and assigns, in accepting this ordinance, expressly covenant and agree that they will sell and convey to the city of *Eau Claire* the said waterworks and all lands, machinery, pipes, mains, hydrants and appurtenances thereto belonging, or in any manner appertaining thereto, at the expiration of five years from the completion of said works and at intervals of five years thereafter at an appraised value for said works to be determined as follows:

"Whenever the city shall determine or desire to purchase said works, the mayor thereof shall give written notice to said grantees, their heirs and assigns, of the intention of the city to purchase and demand of the said grantees, their heirs and assigns, to appoint and select two persons to act as arbitrators in fixing and appraising the value of such waterworks without taking into consideration the property and rights leased or hereinbefore granted by the said city to the said grantees, their heirs and assigns, by this ordinance, or any hydrants and connections which may have been located on said main pipes at the expense of the city, which said notice may be served upon any one of the said grantees, their heirs and assigns, or upon the chief officer in charge of the said waterworks at *Eau Claire*. . . .

"Said five persons, or their majority, at a meeting of which all said arbitrators shall have had personal notice, may and shall, as arbitrators, on examination and evidence, fix and terminate the actual value of the said waterworks, exclusive of the property and rights leased or hereinbefore granted by the said city to the said grantees, their heirs and assigns, by the second section of this ordinance, and without reference to the franchise therewith connected, but including all improvements, buildings, betterments, machinery or other appliances placed by the said grantees, their heirs and assigns,

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upon or connected with the property so leased or granted to them by the said city, and constituting a part of the said waterworks, excepting the hydrants which may have been located on the said main pipes at the expense of said city at the time such appraisal is made, such appraisal not to exceed what it would cost to build and construct such works at that time. And said appraisers shall make their award in writing in duplicate; and shall deliver one duplicate to the said grantees, their heirs and assigns, or to the chief officer in charge of the said waterworks at *Eau Claire,* and shall file the other with the city clerk of the said city within ten days after the same is made."

The city was then to have the option to purchase at such appraisal. Waterworks were constructed by Fairbanks, Morse & Co. and assignee corporation, the Eau Claire Waterworks Company, or by its receiver appointed in certain foreclosure proceedings. In 1903, upon receiver's sale, the entire system, with all rights existing, was sold, and about July 10th of that year transferred to the defendant the *Eau Claire Water Company,* which, at about the same time, executed a mortgage to the defendant *Farmers Loan & Trust Company* to secure a permitted issue of $350,000 of bonds, the amount of which issue is not determined by any evidence except a statement by an officer of the defendant water company that it exceeded $300,000, and that at least $20,000 worth were held by the water company. In 1895 an appraisal was had, upon which the city elected not to purchase. In 1900, at the end of another five-year period, the subject of purchase was submitted to a referendum, and a resolution adopted to call for appraisal under the contract, and a notice of such election and appointment of appraisers was attempted to be given to all interested as assigns of Fairbanks, Morse & Co. by delivery of such notice to the secretary and superintendent of the water company, who resided at *Eau Claire* and was the only officer of either of the defendant companies in Wisconsin and who was in active charge and management of the waterworks business and plant. Five arbitrators were ap-

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pointed in the contract method, two by the city, two by the water company, and a fifth by the circuit judge. They filed an award in which they appraised the property at $253,000. The city made tender of that sum both to the superintendent and secretary of the water company and to the defendant *Farmers Loan & Trust Company* and demanded conveyance and release of the mortgage, which being refused, this action was commenced to compel specific performance of that part of the ordinance-contract agreeing to so convey. Upon the trial a large amount of evidence was offered with reference to the manner of procedure of the board of appraisers. The court found that they proceeded, pursuant to said ordinance and in the manner therein provided, to ascertain and determine the value of said system of waterworks; that they did fix it upon examination and evidence, acting together in all things as a board; that they did not act arbitrarily or in an unreasonable or unlawful manner; did not except or omit to take into consideration any of the items of the property which should have been considered, and fixed the value of said waterworks as of the date when said award was made at $253,000. The court also found the fact of demand and tender and that the city had kept a sum of the tender on hand in its treasury in a separate fund until the commencement of this action, when, on March 5, 1907, it paid the same to the clerk of the court, where it still remains; whereupon judgment was rendered requiring the defendants to make proper conveyance and release, and to accept said $253,000, except that the plaintiff should recover from the defendants the net revenues derived from the waterworks in the interval between the time of tender and the judgment, and should also recover one half of the total fees of the fifth arbitrator paid by it, which, under the contract, were to be paid one half by each party; from which judgment the defendants appeal.

For the appellants there were briefs by *W. F. Bailey,* attorney for *Eau Claire Water Company,* by *Winkler, Flan-*

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ders, Bottum & Fawsett, attorneys for *Farmers Loan & Trust Company,* and by *F. C. Winkler,* counsel for both appellants; and the cause was argued orally by *Mr. Bailey* and *Mr. Winkler.*

A. C. Larson, attorney, and *James Wickham,* of counsel, for the respondent.

DODGE, J. 1. The submission to arbitrators in the present case was simply and solely to decide the one question, viz., What was the value of the entire waterworks plant, excepting those elements thereof derived from the city? The written award is directly responsive to this submission, and declares that the arbitrators have ascertained and fixed the value of such property, excepting only that which the contract directs shall be excepted, at the sum of $253,000. Upon its face, therefore, this award is final and conclusive between the parties as the judgment of any other tribunal having jurisdiction to decide such question, not excepting a court of law or equity. Every presumption is in its favor, and its invalidity must be shown, by any one asserting it, by clear and satisfactory evidence. *Wood v. Trelven,* 74 Wis. 577, 43 N. W. 488; *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 503, 85 N. W. 485; *McCord v. Flynn,* 111 Wis. 78, 89, 86 N. W. 668; *Jacobs v. Queen Ins. Co.* 123 Wis. 608, 613, 101 N. W. 1090; *White Star M. Co. v. Hultberg,* 220 Ill. 578, 77 N. E. 327. All questions of judgment within the submission were concluded by the decision of the arbitrators. They were not subject to appeal or review by the court, and yet the appellants introduced before the court evidence taken by the arbitrators and also additional evidence tending to show a different and higher value. It was sought to have reviewed the question whether conflicting evidence before the board on various questions constituted a preponderance for or against certain decisions or opinions which one or another of the arbitrators expressed upon de-

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tail elements of value, upon which, of course, the board only passed incidentally in reaching its final decision on the one question submitted to it as above stated. While the trial court allowed such testimony to be put in, there is of course no necessary presumption that he gave weight to it in reaching his decision, and we comment upon it merely to indicate the apparently erroneous view of the grounds on which and the manner in which a solemn award upon arbitration can be attacked which was entertained, or at least urged, by appellants' attorneys. The question whether, in the light of all the evidence before it, the board rendered a wrong award fraudulently, arbitrarily, and by mistake, or even in antagonism to the preponderance of evidence, it would seem must be resolved in the negative, for the reason that it does not appear that there was before the circuit court all the evidence upon which the arbitrators acted; not even all the sworn testimony. It is in evidence, as support for whatever findings the court has made, that in a session of some thirty days the arbitrators spent about ten days sitting in an office and hearing testimony and statements; that about an equal time was spent by them in examining in detail the property and various records and documents, and that the remaining period was occupied by general computations, examination of evidence, and discussions and arguments before the board by counsel and by the individual arbitrators. It is made apparent that at all the sessions of the board, both in the office and in the field, statements of facts were continually made, principally by the representatives of the water company, but also by others, notably by members of the board, two of whom were experienced engineers, presumably experts upon many of the subjects worthy of consideration. Under this submission the board had plenary power to decide questions of admissibility, competency, and weight of evidence. *McCord v. Flynn,* 111 Wis. 78, 86 N. W. 668; *Boston W. P. Co. v. Gray,* 6 Met. 131; *Campbell v. Western,*

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3 Paige, 124; *Phaneuf v. Cory,* 190 Mass. 237, 76 N. E. 718; *Roberts Bros. v. Consumers C. Co.* 102 Md. 362, 62 Atl. 585. The arbitrators themselves were competent witnesses before the board. *Graham v. Graham,* 9 Pa. St. 254. They were not excluded from the use of their expert knowledge, which may have been the very reason inducing their selection. 2 Am. & Eng. Ency. of Law (2d ed.) 657, note 3; 3 Cyc. 648; *Cobb v. Dolphin Mfg. Co.* 108 N. Y. 463, 15 N. E. 438. The board were not confined to testimony from witnesses under oath. *Kane v. Fond du Lac,* 40 Wis. 495, 501; 3 Cyc. 642; 2 Am. & Eng. Ency. of Law (2d ed.) 660. If, however, we pass over this seemingly insuperable obstacle to any finding by the court that the evidence before the arbitrators did not support their conclusion and consider all of the evidence offered by the appellants, a large part of which was inadmissible and incompetent under the firmly established rule that the testimony of arbitrators as to what transpired in the hearing and deliberation will not be received to impeach their award (*Bigelow v. Maynard,* 4 Cush. 317; *King v. Jemison,* 33 Ala. 499; *Stone v. Atwood,* 28 Ill. 30; 2 Am. & Eng. Ency. of Law (2d ed.) 705, note 1), we still fail to find any such clear preponderance of evidence of misconduct or even of error in the arbitrators as to justify us in repudiating the finding of the trial court. When we look at the evidence offered in court of misconduct, it is almost entirely directed to an assumed position of the board upon a question not involved in its award, which counsel seem to think might under certain contingencies fall within its duty to decide. That was the question of the cost of reconstruction of a new plant, which they construed not to be an identical plant, but one equally as efficient for the required purposes. The testimony is that, for this purpose, they made up from the inventory a list of those things which would need to be constructed by one putting in a new plant at the time of the arbitration. It is asserted that they ex-

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cluded from this list many things which the water company had which had cost considerable sums and which, the water company argued, were elements of value in its plant. The answer to this contention was of course obvious, that, while elements of value in the existing plant if it were to be sold, they might yet be such structures as no reasonable man would duplicate in erecting a new plant. Many of them had been constructed for purposes which had been found futile and had been abandoned for the objects for which originally constructed, although some of them had been made to serve other purposes which could just as well have been accomplished at less expense. Again, elements which were included in this estimate of cost of construction, it is claimed, were included therein at prices so far below the probable cost thereof as to constitute an arbitrary and fraudulent decision. Notably this was urged with reference to the weight of underground pipe which would be required for an equivalent pipe system, the cost of such pipe and the cost of laying it. The answer to all this class of testimony, however, is that there is no showing that it affected the award in fact made. Indeed, it is shown affirmatively that it was argued and conceded by the board that, in considering its award of the value, they should include an estimate of all enhancement of that value resulting from those things which had been eliminated in the estimate of what a new plant would cost, and the court upon such evidence has found that the arbitrators so acted. It is argued by appellants, however, that when it is shown that the arbitrators adopted a grossly inadequate price for pipe or for the laying thereof it must be assumed that in their mental processes in reaching the conclusion of value they were guided by a previous conclusion as to cost of doing such work anew at the date of the arbitration. This we think is a *non sequitur*. The quantity of pipe in the ground laid through a period of twenty years is not necessarily to be valued as of the cost of laying that pipe at any particular moment, with a

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deduction for the deterioration thereof. One purchasing such a system of works would not contemplate any momentary renewal of such pipe. Doubtless, as the years went by, renewal of the pipe would have to take place, but he would contemplate no such exigency with regard to it that it must be done at a period of the highest price either for material or labor. We do not, however, mean to suggest that the board was without evidence from which they might have determined, even as a step in reaching their award, that the figures used by them in estimating cost of reconstruction would be those fairly to be expected in the event of such reconstruction. Whether they decided correctly or not, is not relevant to the validity of their award.

There is one item which in the light of the argument stands somewhat differently from the others, and that is the flume whereby the water is conducted from the mill pond to the wheels of the pumping station erected by the water company. It was excluded from the list of articles which would be necessary in case of reconstruction of the plant, and one arbitrator was allowed, probably improperly, to testify that he did not allow anything on that item in making up his mind as to the value of the plant. The question before the arbitrators, and again presented to the trial court, was whether this flume was one of the items of property received from the city for which the respondent was not to pay and which the arbitrators were not to take into account. This was a question both of construction of the contract and of evidence. The contract transferred to the company a certain duty on the part of the Dells Improvement Company, the owner of the water power, to supply power for pumping, which it had assumed in a contract with the city, and that contract bound said owner to put in water wheels for power for the city and furnish to said city for waterworks purposes at the place where such wheels are located sufficient water for the efficient operation of said waterworks, which it was claimed bound the

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Dells Improvement Company to construct the necessary flume or aqueduct to transport the water. The evidence on the part of the defendant was that it constructed said flume, but in pursuance of an agreement with the Dells Improvement Company whereby the latter paid it compensation for doing said work. Assuming, though we do not think it proved, that the board decided on these facts that this flume was not part of the property to be included in its appraisal, we think the evidence is sufficient to justify that conclusion and also the inferential finding of the court to the same effect.

It is urged that the arbitrators proceeded arbitrarily in fixing value and did not pursue a proper method. All that is shown, if indeed it is shown by admissible evidence, is that after some thirty days of conference and examination, argument, and reflection, a motion was made by one arbitrator to fix $240,000, which motion was lost, and after some further argument a motion was made to fix $253,000 and was adopted by a majority vote. Various theories for valuation of such a plant are suggested by appellants' counsel, and many more might be, all having support from either economic or judicial writers. It is enough to say of this contention that the evidence fails to show that any of the elements of value were omitted from consideration or failed of their due weight in producing the result. The question of value is illusive, and a fact that may be controlling and significant with reference to one class of property or under certain circumstances sinks into comparative insignificance under others, and every element or consideration varies in its influence according to the judgment and experience of the person who is to decide on a value as between buyer and seller. In *Chicago, B. & Q. R. Co. v. Babcock,* 204 U. S. 585, 27 Sup. Ct. 326, the subject is interestingly discussed and the absurdity pointed out of attacking or permitting an attack upon an award of appraisers upon an intricate question of value by attempting to review their mental processes as imperfectly disclosed by them upon

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cross-examination. It is there said and is equally applicable here:

"Evidently, also, the members or some of them used their own judgment and their own knowledge, of which they could give no very good account on cross-examination, but which they had a right to use, if honest, however inarticulate the premises."

And again:

"But the action does not appear to have been arbitrary, except in a sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."

Other recent cases of interest are *Wilcox v. Consol. Gas Co.* 212 U. S. 19, 29 Sup. Ct. 192, and *Knoxville v. Knoxville W. Co.* 212 U. S. 1, 29 Sup. Ct. 148. There is no element of value suggested by counsel which there is not evidence to show was considered and judgment passed upon its weight by some members of the board, and in that respect the finding of the trial court must conclude further discussion.

It is further urged that the evidence discloses a real value so far in excess of that found by the arbitrators as to convict them of unreason and arbitrary procedure. We cannot at all agree with this contention. The items of evidence principally relied on are, first, the construction account of the company, showing an expenditure through a period of some twenty-one years of approximately $440,000; secondly, an award of certain arbitrators in 1895 of $272,000, with a subsequent expenditure in construction of some $60,000; and thirdly, the accounts of revenue and expenditure, showing in the last year, as claimed, $25,000 of net revenue. Each of these is subject to very obvious possible discredit. For example, in the alleged expenditure of $440,000 were contained many things which had proved to be futile and useless, or

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nearly so, and of little or no actual value to a proposed purchaser of the waterworks plant; also that there had been included, through the years, items which were in whole or in part only replacement of wornout and outgrown appliances. These considerations were proper for the board of arbitrators upon examination alone of the works and of the charges. The fact of another arbitration, with no evidence as to the manner in which it was conducted, and which was never accepted or carried into effect by the parties, was hardly evidentiary. At best, it was the opinion of certain men which could at the utmost only have advisory effect on the minds of the arbitrators. The third item of income is one which may be cogent under some circumstances and of little significance under others. The board could see at a glance that the amount of $25,000 was far in excess of any income which could fairly be expected in permanency from that plant which they were to value. Every man of common sense knows that the plant which furnishes the power to run the pumps for such a waterworks is a very important part thereof, and that power was all furnished by the city and was to be excluded in the purchase of the works. If the net earnings of the defendant's plant and of the city's water power was, in combination, $25,000, demonstrably the net revenues of the water company's plant were something less. It would require neither a philosopher nor an expert to discover fallacy in the contention that, because a wagon with a team of horses earned $100 a year in excess of expenses, the wagon had a value of $1,600. Further, it was made to appear that the element of deterioration in the material parts of the plant had not been deducted in ascertaining this balance of revenue; also that some expenditures for what was properly repair had been diverted into construction account and therefore not deducted; and it was also in evidence that some thousands of dollars of expense for salaries in conducting the business of the water company had also been omitted. It matters

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not whether there was evidence to accurately establish the amount of these imperfections in the so-called earnings account. They were obvious and glaring enough to justify an honest-minded arbitrator in declining to be controlled by the rule of thumb that because the books showed $25,000 of net earnings therefore the plant must be worth over $400,000. Again, the question as to probability of continuance of such earnings was proper for consideration. Against these three principal items of evidence the arbitrators had before them the fact that these same works had been sold in open market, together with the franchises and property interests granted by the city, for $225,000 some three years before the arbitration, and that the subsequent expenditures in additions thereto had been some $20,000. They also had the sworn testimony of the secretary and superintendent, given shortly before the arbitration, that they could reconstruct the works fully for $210,000. In the light of all such evidence we are unable to think that any such glaring undervaluation is shown as would be necessary to force us to a belief in arbitrary and fraudulent action by the appraisers.

2. It is urged, especially by the trust company appellant, that no sufficient notice was given to it before the appointment of arbitrators. We need not discuss the sufficiency as notice of a service upon the person in charge of the property, were a party's rights to be affected thereby *in invitum* and without his consent. It suffices for this objection to point out that all parties had acquired their rights in this property and their liens thereon under and by virtue of a contract which provided that all assigns of the original interest of Fairbanks, Morse & Co. should be effectively and sufficiently notified by a delivery of the notice to such person. They had thus contracted that such service should constitute notice to them. They had made that contract upon abundant consideration, and we cannot consider it otherwise than reasonable, in view of the inability of the city to know with certainty the per-

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sonnel or whereabouts of the assigns, and the necessity for a high public purpose, that the city should be able to take the necessary steps to acquire ownership and control of these waterworks if the welfare of the community demanded it.

Nor can we discover any reason to deem this arbitration invalid because of absence of notice to the trust company of the daily hearings before the arbitrators. The rights of the trust company were entirely derivative from and dependent on those of the water company; it had no ownership in the property, but merely a lien thereon, and it obviously could have exercised no control over the conduct of the arbitration or the personnel of the arbitrators. This view seems to be fully declared in *Chandos v. Am. F. Ins. Co.* 84 Wis. 184, 54 N. W. 390.

Further than this, however, we think it plain that, in the light of the answer of defendant trust company and a colloquy between counsel in the course of the trial, defendants waived any defect that may exist in the preliminaries to the making up of the board of arbitration. It was said, and we think assented to by the counsel of the trust company: "We haven't on this trial or will we make any question as to the regularity of the proceedings up to the time of arbitration. We admit that they were entitled to the arbitration and that the arbitration was had." *Non constat,* if this assurance had not been given to plaintiff's counsel, it might have been shown by evidence that the trust company was in fact informed and notified of all the proceedings and participated therein through the defendant water company.

3. It is next urged that the contract in question is unconscionable, because one-sided and giving the right of purchase to one party without any corresponding right in the other to enforce sale, and that a court of equity should decline to enforce it. The objection might have much force as between two individuals in parity with each other. This contract, however, must be viewed in the light of the purposes sought

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to be accomplished and of the peculiar character of the property and of the parties, especially the proposed purchaser, a municipal corporation. As such it has the care of high and important considerations of public welfare. The protection of its community from fire perils, from threats to the public health, and from excessive charges or inadequate supply of one of the necessities of daily existence are amongst the highest of the duties imposed upon municipalities in this state. For the accomplishment of this purpose the legislature has declared a public policy that cities should have the power to acquire and own waterworks—whether wisely or not is not a judicial question. In cities where waterworks are privately owned that public policy can be carried into practical effect only by the purchase of the existing works, and a contract which goes only so far as to make possible such a purchase cannot be deemed unreasonable or unconscionable, though the same contract between private individuals might be. The municipality must act through several different branches of its government. The legislative branch must pass upon policy, and in so doing must consider multitudinous questions of finance, some of which are answerable only after the price is ascertained. The legislative and executive branches of government may then unavoidably be called into action to provide the means of paying that price, and only after these steps and perhaps many others have been found possible and advisable, have been decided on and have been taken, can the city, through its executive, act effectively in making a purchase. The individual, on the other hand, can both decide and act at once. We see no more in the option provisions of this contract than are reasonably necessary to a fair opportunity for the municipality to take the steps which are necessary to an intelligent consideration by either the electorate at large or the legislative representatives thereof to decide upon the possibility and advisability of purchase after a price is ascertained, and to provide the means to carry into effect that

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decision. Any unusual burdens cast upon the seller thereby are compensated and offset by the burdens resting on the purchaser in performing an important function of government imposed upon it. Besides, they have been compensated by a grant of rights and privileges which none but a governmental agency could confer upon them, and which serves to substantially differentiate the situation from a similar contract for purchase between two individuals acting *sui juris*. The contract has been so far performed by the city that the streets are occupied and other rights held by the water company at least practically obstructive of the city's right and duty to furnish general water supply. These rights and privileges have been conferred on the faith of this contract for purchase. The *status quo* can be re-established and the city placed in its former situation only in case conveyance be compelled. In other words, equity cannot be done, and the rights of the city and the public cannot be protected, except by compelling performance of that promise by which defendants obtained and enjoyed the franchises it now holds. Such considerations have induced courts unhesitatingly to specifically enforce similar contracts. *Farmington V. Corp. v. Farmington W. Co.* 93 Me. 192, 44 Atl. 609; *Bristol v. Bristol & W. W. W.* 19 R. I. 413, 34 Atl. 359; *Schroeder v. Gemeinder,* 10 Nev. 355; *Herrman v. Babcock,* 103 Ind. 461, 3 N. E. 142; *Johnston v. Trippe,* 33 Fed. 530; *Joy v. St. Louis,* 138 U. S. 1, 11 Sup. Ct. 243; 6 Pom. Eq. Jur. (3d ed.) § 773.

4. Some complaint is made as to the sufficiency of the tender of the purchase price fixed by the arbitration. We can see no defect therein. The ordinance-contract required that, to the extent of any outstanding bonds, purchase price should be paid to the trustees for said bonds, otherwise the payment must be to the holder of the title. The required amount was tendered to the holder of the title, accompanied by merely a condition that a release of the mortgage be pro-

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cured. The city had no means of knowledge what amount of indebtedness was secured by the existing mortgage. The tender was made to the secretary and superintendent of the corporation, the only officer thereof in the state of Wisconsin. It was undoubtedly a tender to that corporation. Then, for the first time, the city received information, binding upon the water company, that the amount of that indebtedness exceeded the amount of the purchase price, whereby it learned that the whole amount of such purchase price was by the terms of the ordinance-contract payable to the trustee in the mortgage. It accordingly made actual, manual tender of said amount to such trustee. The money has been kept ready for the defendants ever since: First, by a deposit as a separate fund in a public treasury, and later by deposit in court; thus, undoubtedly, has the tender been kept good. *Mankel v. Belscamper,* 84 Wis. 218, 54 N. W. 500; *Appleton v. Appleton W. W. Co.* 136 Wis. 395, 117 N. W. 816.

An item of $1,227 for laying certain extensions after the arbitration was commenced did not need to be included either in the amount of the award or the amount of the tender. It was payable upon a separate and distinct contract whereby the water company agreed to do the work and the city to pay the cost thereof in the event that the works were purchased in pursuance of the arbitration, and an order had been duly issued therefor whereby that amount of money, which was at all times in the city treasury, became appropriated to the defendants. *Appleton v. Appleton W. W. Co., supra.*

5. Further, it is contended that the city could not by tender or otherwise obligate itself to pay the $253,000 of award at the time it decided to purchase the works and made the tender, for the reason that thereby the indebtedness of the city would be brought to excess above the constitutional limit of five per cent. on its assessed valuation. Laying to one side the question whether the defendants could raise any such objection when the actual money was in the possession of the

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city and was tendered to them, we think that the premise upon which the objection is founded is not established. The court found that an addition of $253,000 to the debts then existing would not bring the total to an excess over the five per cent. In reaching this conclusion of fact the court decided that certain items of city assets were proper offsets or deductions from either its present or prospective amount of indebtedness. The first of these was the amount of the sinking fund accumulated against outstanding city bonds; the second was the amount of the general fund then in the treasury; the third was a credit fund consisting of certain special assessments, for pavement, sewers, and sidewalks, to be more fully described hereafter; and the fourth was a sum of $68,000 which had been contributed by subscribers for proposed nonliability bonds to be issued upon the security of the waterworks after the same should be acquired. The financial statement makes apparent that if either all the first three classes of assets or the fourth item were proper offsets against the indebtedness, the city could incur the additional $253,000 without exceeding its five per cent. limit. As to the sinking fund, it is confessedly and by all authority a proper offset against the existing bonds to payment of which it is pledged. *Rice v. Milwaukee,* 100 Wis. 516, 520, 76 N. W. 341; *Kronsbein v. Rochester,* 76 App. Div. 494, 78 N. Y. Supp. 813. The money in the general fund is also, it seems almost too clearly for debate, a proper practical offset against indebtedness. The council might have used such fund momentarily to pay off any item of indebtedness or to pay for the waterworks. This view seems to be sustained by *Rice v. Milwaukee,* 100 Wis. 516, 76 N. W. 341, where a general fund, except so far as specifically pledged, was so treated. Even if we accept the somewhat limited view that possession of assets does not diminish existing debts, still the necessity of incurring new and further debt in making an anticipated purchase is obviated

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and diminished by possession of money with which to pay the purchase price. The purchase of the waterworks is only illegal if and because the city will *ex necessitate* thereby become indebted for such additional amount as will bring the total debts above the five per cent. limit. If it has $60,000 which it can pay in cash upon the purchase, its debt is increased not $253,000, but only $193,000. Hence the money in hand is effective in that way to avert the predicament which it is claimed would render void the purchase. That money in hand for general city purposes might be so used, seems to us clear. Provision of water supply is a legitimate city purpose, as much as cleaning or lighting streets, for which such a fund may be used in absence of charter restriction. *Ellinwood v. Reedsburg,* 91 Wis. 131, 64 N. W. 885; *Appleton W. W. Co. v. Appleton,* 116 Wis. 363, 374, 93 N. W. 262.

The special assessment certificates present one additional question. The city is empowered to cause certain street improvements to be made and the expense to be levied as a special assessment on the abutting lots. It may pay for the work itself or may let contracts whereby the contractors take their pay in the special assessment certificates. *Eau Claire* took the former method, paid for the work out of the general fund, levied definite amounts upon specific parcels of property, issued certificates therefor, and now holds such certificates in process of collection, which, by law, is accomplished by including such assessment in the tax carried out against the respective parcels, either in one sum or in instalments of one fifth in each of five years. Of course the money when collected returns to the general fund in replacement of money paid therefrom for the expense of the improvement. The certificates, or, if extended, the improvement bonds, draw six per cent. interest, and are, the court finds, readily salable for their face. Such money, when collected into the general fund, is obviously controlled by the considerations

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with reference to that fund itself already expressed. We can see no escape from the view that so much of the money due on those certificates, not actually collected, as is potentially within reach for general city expenses is equally within that fund, and, like it, available in offsetting existing indebtedness or averting necessity for new indebtedness for anything purchasable out of the general fund. The question when prospective revenues are so potentially in hand that they may be counted against the contracted expenditures has often been considered by this court. *Earles v. Wells,* 94 Wis. 285, 68 N. W. 964; *Crogster v. Bayfield,* 99 Wis. 1, 7, 11, 74 N. W. 635, 77 N. W. 167; *Rice v. Milwaukee,* 100 Wis. 516, 76 N. W. 341; *Herman v. Oconto,* 110 Wis. 660, 670, 86 N. W. 681; *Balch v. Beach,* 119 Wis. 77, 82, 95 N. W. 132.

In *Earles v. Wells* it is said that "a municipality's capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due;" and states the antithetical condition as "with no money nor assets in the treasury, nor current revenues collected or in process of collection for the payment of the same." In *Crogster v. Bayfield* the first above quoted words were assumed to correctly state the law, and apparently a quantity of tax certificates owned by the county were held available as a credit to the extent of their sale value, although of course the only method of collection was by the sale of the property, purchase thereof by the county, and maintaining the lien thereon for future payment. In *Rice v. Milwaukee* were considered prospective fees for liquor licenses and upon taxation or license of the street railroad, depending on its earnings, and payable five months later than the date under consideration, and they were rejected for the reason that they were "entirely indefinite and uncertain. They

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were not in process of collection, and could be collected only at the will of parties who sought privileges for which license charges were made, and for that reason could not be considered as available assets or resources." The court further defined potential assets as only such "as the corporation had levied, and had a legal right to enforce, regardless of any one's will or pleasure. The 'available assets and resources' referred to means tangible property in the treasury legally available and properly applicable to the payment of debts and readily convertible into money for that purpose." In *Herman v. Oconto* was under consideration the city's condition in October, and the annual taxes which had been decided to include in the tax roll were held not proper assets or revenues in process of immediate collection, because they had not yet been levied; that not until "the proper tax roll was put in the collector's hands and the tax was then enforceable regardless of the will of the taxpayer" could the taxes be considered assets. *Balch v. Beach* was to the same effect. In the instant case all of the conditions prescribed in these several decisions seem to be satisfied. The amount of the special assessments had been levied, they were in course of the process of enforced collection, and were not subject to or conditioned upon the volition of anybody. The question of doubt is whether a process of collection which under the law may be protracted as to a part through a period of four years is a process of immediate collection, as such word is used in some of the cases. This expression was used to exclude a condition where no levy and right to commence collection existed. In any event *Crogster v. Bayfield* seems to be authority for the conclusion that, at least to the extent for which such liens duly levied upon specific real estate can be sold by the city, they constitute a present available asset for the purpose of paying debts to which they are applicable. There is no evidence as to what proportion of this $30,000 of special assessments there had been steps taken to extend

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them over the permissive five-year term; but we think that immaterial, for the reason that, if so extended, the city was at liberty to issue improvement bonds in place of them, which would draw interest, which might be sold, or which might be an entirely legitimate investment for the moneys in the sinking fund. Such improvement bonds, in the light of the charter, would not constitute an indebtedness of the city, as counsel asserts on the authority of *Fowler v. Superior,* 85 Wis. 411, 54 N. W. 800. The authority of that case has been strictly limited to the issue of bonds then under consideration. *Uncas Nat. Bank v. Superior,* 115 Wis. 340, 349, 91 N. W. 1004; *Chase v. Superior,* 134 Wis. 225, 114 N. W. 437.

We therefore conclude that it was not made to appear that the purchase of the waterworks in question for $253,000 would necessitate the incurring of an indebtedness which, added to the existing debt, would exceed the constitutional limit of five per cent. upon the assessed valuation. We express no opinion, therefore, as to whether the $68,000 mentioned above, paid into the city treasury as subscription for prospective nonliability bonds, could be considered an asset in reduction of indebtedness.

6. Error is assigned upon the accounting, not because the defendants were required to account for the net revenues earned by the works since the tender, and credit the same to the plaintiff—the correctness of which seems to be conceded,—but upon the failure to offset against the same interest on the purchase price from the time of its tender. The rule seems to be, generally, that when one who is under a legal duty to convey property to another, wrongfully, though in good faith, refuses to do so, a court of equity will treat the property as belonging to the grantee after the time at which it ought to have been transferred, and will treat the wrongful holder as a trustee thereof for the purchaser's benefit, liable to account at least for profits actually received.

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Benson v. Cutler, 53 Wis. 107, 10 N. W. 82; *S. C.* 66 Wis. 305, 28 N. W. 134; *Bostwick v. Beach,* 103 N. Y. 414, 423, 9 N. E. 41; *S. C.* 105 N. Y. 661, 12 N. E. 32; Fry, Spec. Perf. (3d ed.) §§ 1372–1375. Obviously, however, if the grantee has enjoyed the use of the purchase money, or, indeed, has by his act deprived the grantor of it, the very equities of the case would demand that the latter's duty to account for profits be abated to that extent; but where the purchase money has been tendered, and has been so appropriated to the purposes of the tender that the purchaser has received no benefit therefrom meanwhile, and the failure of the seller to receive it and enjoy its use is due wholly to his own fault, no very good reason is apparent why the loss of interest which such money might have earned if put to use should fall on the innocent purchaser. The authorities are generally to that effect. Fry, Spec. Perf. (3d ed.) § 1383; Waterman, Spec. Perf. § 519; *Bostwick v. Beach, supra; Davis v. Parker,* 14 Allen, 94; *Eastman v. Simpson,* 139 Mass. 348, 1 N. E. 346. In the present case it appears that the amount of the tender has been, through all of the period of litigation, strictly set apart and appropriated, as, indeed, it needed to be in case at any moment the defendants should change their attitude and tender conveyance. True, it may not have been put out of the control of the defendants, but it was kept in the hands of the city treasurer, an officer of the law, whose duty it was by law to pay it over to the defendants when they complied with the legal requirements. When a municipal corporation thus sets aside and appropriates money to a debt, and places it with an officer of the law as a special fund which the debtor can receive at any time, it is at least such tender as is effective to stop interest. *Appleton W. W. Co. v. Appleton,* 136 Wis. 395, 117 N. W. 816. The record is barren of any evidence that the city did receive any interest upon this fund, and we certainly cannot take judicial notice that there was any opportunity for it by reasonable diligence to

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have done so. Such a fund, liable to be withdrawn any moment, would be an embarrassment rather than an advantage to any bank likely to be found in a city of the size of *Eau Claire,* and therefore not likely to invite compensation for its deposit even at a low rate of interest. We cannot think any error was committed in refusing to offset interest upon this fund against the profits realized by the defendants from the use of the waterworks, which they should have conveyed to the plaintiff at the time of the tender.

We find no error which need reverse the conclusion of the circuit court.

By the Court.—Judgment affirmed.

BROWN, Plaintiff in error, vs. THE STATE, Defendant in error.

December 19, 1908—January 26, 1909.

Criminal law and practice: Statutes defining crimes: Construction: Time when statutes take effect: Physicians and surgeons: Registration of births: "Wilfully."

1. Ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), which, among other things, denounces a penalty upon any physician who, on or before October 1, 1907, shall fail to register his name, address, and occupation with the "local registrar" of the district in which he resides, took effect from and after October 1, 1907. The same statute created the office of local registrar. *Held,* that until October 2, 1907, there was no "local registrar" in existence, and hence a compliance with the only command of the statute with reference to registration was impossible.
2. A law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal.

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3. One cannot be said to wilfully violate a statute which is so contradictory or blind that he must guess or conjecture what his duty is thereunder.
4. An act, in order to be wilfully criminal, must fall both within the words of the denunciatory statute and within its spirit.
5. Under ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), denouncing a penalty upon any physician who, on or before October 1, 1907, shall fail to register his name, address, and occupation with the local registrar of the district in which he resides, and under the evidence, stated in the opinion, it is *held* that defendant was not shown to have wilfully failed and neglected to register in breach of the command of the statute.
6. "Wilfully," when used to describe acts which shall be punished criminally, includes, in addition to mere purpose to do the act, a purpose to do wrong, and involves evil intent or legal malice.
7. "Wilfully," in the Wisconsin criminal statutes, is satisfied only by evil intent without justifiable excuse, and is used to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty.
8. Ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), denounces a penalty upon any physician who wilfully refuses to make a certificate of birth in a prescribed form within five days after the date of birth. Defendant, a physician, who had no actual knowledge of the passage of the law of 1907, attempted to perform his duty in reporting births by making a certificate upon a blank which had theretofore been furnished him by the city health officer, who, under the act of 1907, became local registrar. This certificate was returned to defendant and his attention called to the fact that it did not comply with the new law. Defendant thereupon returned the certificate, stating that he had none of the so-called new blanks, and made application for some of them, but, although the certificate was again returned to defendant, no blanks were supplied, and a few days thereafter the instant prosecution for violation of the act of 1907 was commenced. *Held*, that defendant was not guilty of wilful violation of the law of 1907, but there was a mere inadvertent omission of a required act in the sincere attempt to perform a duty as defendant understood it.

[9. Whether ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), is an invasion of the constitutional rights of the individual, not determined.]

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ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Reversed.*

Plaintiff in error was informed against for that, being a physician and having attended upon the birth of a certain child on or about November 10, 1907, he, first, wilfully and unlawfully failed, neglected, and refused to register his name, address, and occupation with the local registrar of vital statistics for the district of Milwaukee, where he lived; and, secondly, that on the 5th day of December he did wilfully and unlawfully fail, refuse, and neglect to file a certificate of the birth of said child, properly and completely filled out, giving all of the facts required by law, with the local registrar of vital statistics of the district of Milwaukee, and still does wilfully and unlawfully fail, neglect, and refuse to file said certificate. The case was finally tried before the municipal court of Milwaukee county, without a jury, whereupon said court, without filing formal findings, did adjudge the defendant guilty as charged in the complaint, and sentenced him to a fine of $20, with imprisonment in case of nonpayment, to review which judgment the accused sued out writ of error.

Frank M. Hoyt, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *F. T. Tucker,* assistant attorney general, and oral argument by *Mr. Tucker.*

DODGE, J. This prosecution is under ch. 469, Laws of 1907, which went into effect October 1st of that year. Prior thereto the notification of births had been required to be made to municipal officers, in Milwaukee to the commissioner of health. The effect of the statute of 1907, now designated as sec. 1022—1 to sec. 1022—59, inclusive, was to create a state bureau of vital statistics (sec. 1022—1), to create the offices of state registrar (sec. 1022—2), and local registrars in each municipal subdivision of the state (sec. 1022—6). It

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imposed on the state board of health and the state registrar authority to make and promulgate rules and regulations (secs. 1022—2, 8). It required the state registrar to prepare blanks for the necessary certificates of births and deaths and to supply them to the local registrars (sec. 1022—7). It required the local registrar to supply blank forms of certificates to such persons as require them (sec. 1022—20). It required each physician, on or before the 1st day of October, 1907, to register his name, address, and occupation with the local registrar of the district in which he resides (sec. 1022—19). It required that the physician or midwife in attendance upon any birth should file a certificate of birth properly and completely filled out, giving all the particulars required by this act, with the local registrar of the district in which the birth occurred, within five days after the date of birth (sec. 1022—28). It prohibited the use of any blanks other than those supplied by the state registrar (sec. 1022—8); and it amended sec. 4608*h*, Stats. (1898), to provide:

"Any person who shall wilfully violate any of the provisions of secs. 1022—1 to 1022—59, inclusive, or who shall neglect or refuse to perform any duty or do any act imposed upon him or required by said sections, or who shall neglect or refuse to make any certificate required by said sections to be made, or falsely make any such certificate, or knowingly make any false statement in such certificate, or who shall alter any certificate or report provided for or required by said sections, shall be punished" by fine or imprisonment (Laws of 1907, ch. 469, sec. 2);

and by its final section (sec. 5) provided: "This act shall take effect and be in force from and after October 1, 1907."

The facts, which are not in dispute, are that the defendant is a physician, in active practice in the city of Milwaukee since 1879; that his name, age, and profession have for many years been registered in the office of the city health officer, who by the act of 1907 (sec. 1022—6) is made local regis-

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trar; that he had no actual knowledge of the passage of the new law; that he attended the birth of the child in question on or about the 10th day of November, 1907; that at that time he was equipped with blanks for certifying births which had been sent him by said city health officer; that the father of the child was absent from town for some days, and that immediately upon his return defendant obtained from him the information necessary to fill such blanks as he had; and that some time prior to December 5, 1907—when is not proved,—he forwarded the same to the health commissioner, who was also the local registrar, in supposed compliance with the law. The certificate was returned to him, calling his attention to the fact that the same did not comply with the new law, and also calling his attention to that section of the law which required every physician on or before October 1, 1907, to register name, address, and occupation with the local registrar. The defendant returned the certificate and wrote that he had been registered in the office of his correspondent since 1879, also stating that he had none of the so-called new blanks, and that he made application for some of them. This was again returned by the local registrar, but no blanks were supplied, and a few days after this prosecution was commenced upon his instigation, apparently without report to, or authority from, the state registrar, as seems to be at least suggested by sec. 1022—9. A book from the city health office was produced, labeled "Physicians' Register," and containing name, address, and occupation of defendant.

Obviously, there are two offenses alleged in the complaint, namely, the failure to register and the failure to file a certificate of birth. They stand upon different grounds. The only provision for registering to be found in the act is sec. 1022—19, which requires the registering to be done on or before October 1, 1907, and contains no requirement whatever that a physician register thereafter, though by implication it may so permit. By the last section the act did

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not go into effect until after October 1, 1907. *State ex rel. Att'y Gen. v. Messmore,* 14 Wis. 163; *O'Connor v. Fond du Lac,* 109 Wis. 253, 262, 85 N. W. 327. There was therefore not until October 2d any "local registrar" in existence, and a compliance with the only command of the statute with reference to registration was impossible. It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal. One cannot be said to wilfully violate a statute which is so contradictory or blind that he must guess or conjecture what is his duty thereunder. 2 Suth. Stat. Constr. (2d ed.) § 520. Had the defendant been ever so accurately and perfectly informed of this law, what would he have done to comply with it? He could not, as we have said, comply with its terms; and if he could not make such registration with the nonexistent local registrar, with whom should he make it, if at all? If with the municipal health officer, who was on October 1st to become local registrar, then he had already done so. Under the pre-existing laws the relations of the physicians were with different local officers, largely with the register of deeds; in some cases the city clerks. Must a physician at his peril guess that when the legislature ordered him to file with a certain state officer, and he found that impossible, they meant that he should file with the register of deeds? The solution of such conundrums cannot be imposed upon individuals at the risk of criminality if they make a mistake. An act, in order to be wilfully criminal, must fall both within the words of the denunciatory statute and within its spirit. 2 Suth. Stat. Constr. (2d ed.) §§ 520, 521; *U. S. v. Wiltberger,* 5 Wheat. 76, 95; *Ex parte Bailey,* 39 Fla. 734, 23 South. 552. Because this statute made impossible compliance with the words of sec. 1022—19, and, while registration has been

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possible and permitted since, there is no word in the statute requiring it, we hold that the defendant was not shown to have wilfully failed or neglected to register in breach of the command of the statute.

2. Turning now to the charge that he wilfully neglected to file such a certificate of birth as the statute commanded: The word "wilfully" has acquired a pretty well defined meaning in criminal statutes. While its lexiconic significance may in some association be no more than intentionally or even knowingly, yet, when used to describe acts which shall be punished criminally, it includes, in addition to mere purpose to do the act, a purpose to do wrong. It involves evil intent or legal malice, according to the great weight of authority. *Felton v. U. S.* 96 U. S. 699, 702; *Potter v. U. S.* 155 U. S. 438, 446, 15 Sup. Ct. 144; *Spurr v. U. S.* 174 U. S. 728, 734, 19 Sup. Ct. 812; *State ex rel. v. Alcorn,* 78 Tex. 387, 14 S. W. 663; *Comm. v. Kneeland,* 20 Pick. 206, 220. This meaning for the word has been declared for Wisconsin statutes in the words of DIXON, C. J., in *State v. Preston,* 34 Wis. 675, as satisfied only by "evil intent without justifiable excuse." It is used "to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty;" and that case has been considered authoritative. *State v. Castle,* 44 Wis. 670, 676; *State v. Smith,* 52 Wis. 134, 137, 8 N. W. 870.

We are convinced that defendant's conduct evinces no such state of mind. The voluntary effort to perform his duty by making certificate upon the blanks which had been supplied him by the public officer, and the offer to comply with new regulations implied by his request that new blanks therefor be sent him, together with other circumstances, make plain that there was mere inadvertent omission of a required act in the sincere attempt to perform his duty as he understood it.

Since the views already expressed preclude a conclusion

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of guilt upon the charges preferred, even if ch. 469, Laws of 1907, be valid, we forego consideration of the very earnest contention by plaintiff in error that many of the requirements in that act are either so impossible of performance, as requiring physicians to certify facts which they cannot know, or so unreasonable, as requiring them to certify to facts within five days as to which they can only gain even secondary information by the expenditure of much time and labor, that the legislature, it is argued, has no right to impose them without compensation; and that the whole act is therefore an invasion of the constitutional rights of the individual.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

PIERCE, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY, Appellant.

January 5—January 26, 1909.

Eminent domain: Electric railroads: Right of way: Uses: Admissibility of evidence: Instructions to jury: Remote and speculative damages: Witnesses: Competency: Experts: Qualifications: Hypothetical questions: Appeal and error: Review: Prejudicial error: Damages and benefits: Uses of land taken: Values: Averages.

1. In proceedings to condemn a right of way for an electric railroad, evidence showing that the defendant railroad was connected with and had traffic arrangements with commercial railroads, of the probable location of its freight yards and their proximity to such other railroads, and what under its charter were its powers and privileges as to its right to use motive power other than electric in its use of the strip of land sought to be condemned, is *held* admissible to show what use the defendant might make of this strip.

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2. In proceedings to condemn a right of way for an electric railroad, the nature of the use of the strip sought to be condemned is material on the question of damages to the landowner's adjoining property, if it appears that a particular use would naturally tend to depreciate its market value.
3. In proceedings to condemn a right of way for an electric railroad, instructions to the jury informing them that evidence that the defendant's railroad was connected with and had traffic arrangements with commercial railroads, of the probable location of its freight yards and their proximity to such other railroads, and what under its charter were its powers and privileges as to its right to use motive power other than electric in its use of the strip of land sought to be condemned, could only be considered on the question of the market value of the land not taken, are *held* appropriate and sufficient to inform the jury of its duty in considering such evidence.
4. In proceedings to condemn a right of way for an electric railroad, items of evidence of the cost of replacing sheds and fences taken as part of the strip, and of the danger to life and property consequent upon a railroad farm crossing, are not in themselves elements for which damages can properly be allowed as items of injury to the adjoining land, and in arriving at the damages are to be rejected as too remote and conjectural as causes of depreciation.
5. In such case the court instructed the jury, in substance, that such class of evidence was only "received as showing reasons upon which witnesses testifying thereto base their opinions that the fair market value of the land not taken was depreciated because of the presence of the railway, and may be considered by you in explanation of their opinions as to valuation and depreciation, to assist you in estimating the value of such opinions, and to aid you in measuring the real loss to the owner. Such facts do not constitute a basis for separate and distinct damages, for they are too remote and speculative;" that the damage to the adjoining land, if any, was the actual depreciation of it in market value at the time of the award on account of the taking of the strip for railroad uses, and that the fair market value of the strip taken included trees and improvements. *Held*, under such positive directions and instructions, that it is presumed that the jury understood that they were not to assess any special damages on account of such conjectural or remote conditions, and that they followed such explicit instructions in arriving at their verdict.
6. Testimony of a witness qualifying as an expert as to values of

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farm lands, that he had owned real estate in a city distant about one quarter of a mile, that he had owned acreage property, that he had theretofore bought and sold some, and that he had made inquiries as to market values, shows sufficient information on the subject to enable him to express his opinions on the questions covered, the grounds of his opinions and their weight being for the determination of the jury.

7. In proceedings to condemn lands for an electric railroad, a hypothetical question as to values, stated in the opinion, is *held* not to embrace improper items of evidence, to contain sufficient facts to enable the witness to form an opinion, and not to be misleading or confusing.

8. In proceedings to condemn lands for an electric railroad, where a witness had fully testified on the questions of the adaptability of the lands, a farm, for platting and how to plat it after the taking of the strip for railroad purposes, it is not prejudicial error to sustain an objection to a question: "Would you, as a real-estate man, advise the owner of the farm to cut it into acre tracts and sell them off on Asylum avenue?" since an answer to the question would at most be expressive of the witness's opinion or advice regarding the advisability of platting and cutting off acre tracts on Asylum avenue.

9. If such question was designed to elicit an answer respecting the market value of the land in acre lots, the ruling was also proper, because the question failed to disclose any such purpose and an appropriate answer thereto could not give such information.

10. In proceedings to condemn lands for an electric railroad, portions of instructions to the jury excepted to, stated in the opinion, which were only parts of sentences or paragraphs embracing one subject and which should be considered in connection with the other parts, are *held* not to be subject to the claim that they conveyed the idea that the jury were not to take into consideration any enhanced value of plaintiff's lands at the time of taking by reason of the probable construction of the road.

11. In proceedings to condemn land for an electric railroad, instructions to the jury, in substance, that the railroad company has the right under the law to occupy and use such land for all the purposes prescribed in its charter and articles of incorporation, that a present omission to exercise all such rights does not reduce the damages actually sustained, and that the award made by the jury should cover the plaintiff's damages for all time and every authorized use, in connection with information that the jury were not to consider any remote, speculative, and improbable uses, but were to confine their considera-

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tion to the actual facts of the case, are *held* to embody the rule applicable to the situation, correctly embrace the elements of the case bearing on the question at issue, and to sufficiently cover defendant's requests on that subject.

12. In proceedings to condemn land for an electric railroad, refusals to instruct and the instructions given which pertained to duplication of damages, the defining of fair market values, the value of the strip actually taken, the materiality of sales of other property in connection with opinion evidence of witnesses as to market value, the opinions of witnesses as to the damages to the remainder of the land based on the depreciation of the market value of the whole, the adaptability of the remainder of the land for platting because of the railroad crossing, and its availability for present and immediate uses, are *held* not to have been erroneous.

13. In proceedings to condemn lands for an electric railroad, instructions to the jury that they were not to agree in advance to add the values as fixed by the various witnesses, to divide the total by the number of witnesses, and to adopt the result as the true value, but that they were "to consider all credible evidence, facts, and circumstances in the case, and therefrom find and determine the fair market value of the land taken and the depreciation, if any, to the fair market value of the land not taken," are *held* to be an appropriate and correct submission, and not open to the objection that thereby the court informed the jury that they could take an average of the fair market values testified to by the various witnesses as the actual market values of the property involved.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an appeal from a judgment awarding the respondent $6,793.58 as his damages for the condemnation for railroad purposes of a strip of land 150 feet wide across the corner of his farm. The farm embraces about eighty acres, lying along a public highway, and is from one fourth to one half a mile from the limits of the city of Racine. Asylum avenue, the public highway to the east of the land, runs from the city in a southwesterly direction and makes a sharp angle with the northern boundary of the land. The other boundaries of the land run north and south and east and west. The right of way cuts off at the northeast corner a

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triangular piece of land containing about 1.92 acres. The northern forty-four and one-half acres of the remainder of the tract, lying west of the strip taken, were cut off from access to Asylum avenue by the condemnation. The intersection of the railroad right of way with Asylum avenue is east of the south line of a large and substantial two-story brick house facing the avenue. The house is eighty-seven feet from the nearest point of the avenue, and with the other farm buildings lies north of the point of intersection of the right of way and the avenue. Where the right of way on the south enters the property the grade of the railroad is six inches lower than the grade of the avenue. The grade of the railroad at the northern boundary of the property is two feet and eight inches below that of the land. A number of shade trees upon the property were taken and destroyed. The small triangular piece cut off by the right of way has a frontage of 650 feet on Asylum avenue. The right of way occupies 256 feet of the frontage of the farm on the avenue, and the land west of the right of way has left a frontage on the avenue of 594 feet. The evidence as to the value of the farm varied from $300 to $1,000 per acre. The commissioners appointed upon appellant's petition fixed the value of the land taken, with its improvements, at $1,775, and the damages to the balance of the farm at $2,800. On the appeal to the circuit court the jury fixed respondent's compensation and damages at $6,500, for which judgment was awarded. This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *Simmons, Nelson & Walker,* and oral argument by *John B. Simmons.*

For the respondent there was a brief by *Kearney, Thompson & Myers,* and oral argument by *T. M. Kearney* and *W. D. Thompson.*

SIEBECKER, J. It is contended that evidence showing that the defendant railroad is connected and has traffic ar-

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rangements with commercial railroads, and evidence of the probable location of its freight yards and their proximity to such other railroads, and what under its charter were its powers and privileges as to its right to use motive power other than electric in its use of the strip of land sought to be condemned, was erroneously received and submitted to the jury. All of this evidence was manifestly admitted to show what use the defendant might make of this strip. The nature of the use of the strip is material on the question of damages to plaintiff's adjoining property, if it appears that a particular use would naturally tend to depreciate its market value. We regard this evidence as pertinent to this question, and it was properly received. The court informed the jury that this class of evidence could only be considered on the question of the market value of the land not taken. This was an appropriate instruction and was sufficient to inform the jury of its duty in considering this evidence.

The plaintiff was permitted to state in evidence the cost of replacing sheds and fences taken as part of the strip. Another witness testified to the danger to life and property consequent on a railroad crossing a farm. These items of evidence are not in themselves elements for which damages can properly be allowed as items of injury to the adjoining land, and in arriving at the damages are to be rejected as too remote and conjectural as causes of depreciation. The jury were informed that this class of evidence was only "received as showing reasons upon which witnesses testifying thereto base their opinions that the fair market value of the land not taken was depreciated because of the presence of the railway, and may be considered by you in explanation of their opinions as to valuation and depreciation, to assist you in estimating the value of such opinions, and to aid you in measuring the real loss to the owner. Such facts do not constitute a basis for separate and distinct damages, for they are too remote and speculative." The court also repeatedly instructed the jury that the damages to the ad-

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joining land, if any, was the actual depreciation of it in market value at the time of the award on account of the taking of the strip for railroad uses, and that the fair market value of the strip taken included trees and improvements. Under these positive directions and instructions it is a reasonable inference that the jury understood that they were not to assess any special damages on account of these conjectural or remote conditions, and that they followed the explicit directions of the court. *Hutchinson v. C. & N. W. R. Co.* 41 Wis. 541.

Another contention is that the witness Norton, whom plaintiff examined on the question of land values and damages to adjoining lands, was not qualified to give opinion evidence on these subjects because of a lack of showing that he had any knowledge of this kind of property and of its market value. This witness had testified before these inquiries were propounded to him that he had owned real estate in the city of Racine, that he had owned acreage property, that he had theretofore bought and sold some, and that he had made inquiries as to market values. This showed sufficient information on the subject to enable him to express his opinions on the subjects covered. The grounds of his opinions were before the jury, and the weight of his evidence was properly submitted to them for determination. *Diedrich v. N. W. U. R. Co.* 47 Wis. 662, 3 N. W. 749; *Stolze v. Manitowoc T. Co.* 100 Wis. 208, 75 N. W. 987.

An exception is urged to a hypothetical question propounded to several witnesses to obtain their opinions on the interrogatory of whether or not the fair market value of the remainder of plaintiff's farm had been depreciated by the taking of the strip in question for railroad purposes. The exception is urged upon the ground that it embraced facts not properly before the jury, other facts not covered by the evidence, and that it did not embrace all the evidentiary facts necessary to enable the witnesses to give an opinion on

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this question. The question is not open to the objection urged. Examination satisfies us that it does not embrace improper items of evidence, and that it contains sufficient facts to enable the witnesses to form an opinion therefrom of the fair market value of the remainder of the farm at the time of the taking of the strip for railroad right of way. In form and substance the question cannot be said to be misleading or confusing, as claimed, nor does the reference therein to the north forty-four and one-half acre part of the farm as descriptive of part of the property convey the idea that it was segregated from the rest in fixing a fair market value on the remainder of the land. It is manifest that such reference was only to designate it as a component part of the remainder.

An objection was sustained to the following question propounded by the defendant to one of its witnesses: "Would you, as a real-estate man, advise the owner of the *Pierce* farm to cut it into acre tracts and sell them off on Asylum avenue?" This is alleged as prejudicial error. We cannot so regard it. An answer to the question would at most be expressive of the witness's opinion or advice regarding the advisability of platting and cutting off acre tracts on Asylum avenue. The witness had fully testified on the questions of the adaptability of the farm for platting and how to plat it after the taking of the strip for railroad purposes. This covered the inquiry embraced in this question, and an answer could have added nothing to his prior statements respecting it. If the question was designed to elicit an answer respecting the market value of the land in acre lots, then the ruling was proper, because the question fails to disclose any such purpose and an appropriate answer thereto could not give such information.

Numerous exceptions to refusals to instruct the jury and to the instructions given are urged as prejudicial error. A number of these alleged errors pertain to instructions given

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in submitting evidence to which objection had been made by appellant, and others are exceptions to the refusal of the court to give requested instructions on such evidence. We find no error in these rulings, and in the light of the foregoing consideration need not further consider them.

It is averred that it was error to instruct the jury that they were not "to consider general benefits, if any, which may accrue to the property here in question, because of the location of the railroad and buildings in that vicinity," that "such general benefits may consist of an increase in value or salability of the lands common to the neighborhood or community generally," and that they should "allow plaintiff such sum as will make him good as if such railroad had not been located upon his land and had passed over adjoining lands in that vicinity." These portions of the instructions given to the jury are only parts of sentences or paragraphs embracing one subject and should be considered in connection with the other parts. We find no grounds to sustain appellant's claim that these instructions conveyed the idea to the jury that they were not to take into consideration any enhanced value of plaintiff's land at the time of taking by reason of the probable construction of the road. The instruction as a whole informed the jury correctly that any general benefits from the building of the railroad resulting to plaintiff as one of the community generally were not to be deducted from the amount found to be the depreciation suffered by the remainder of his property by reason of the location of the railroad upon the strip taken. The jury were clearly informed that the recovery was limited to the fair market value of the strip at the time of taking, and that the damages to the remainder were restricted to the depreciation, if any, in its fair market value at the time of its condemnation. This is in accord with the rule approved by this court. See *Gosa v. Milwaukee L., H. & T. Co.* 134 Wis. 369, 114 N. W. 815.

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It is urged that the court erred in submitting to the jury and informing them that they might properly consider the evidence that "the railroad company has the right under the law to occupy and use said tract for all the purposes prescribed in its charter and articles of incorporation;" that a present omission to exercise all such rights does not reduce the damages actually sustained, and that the award made by them should cover the plaintiff's damages for all time and every authorized use. In this connection the court informed the jury that they were not to consider any remote, speculative, and improbable uses, but were to confine their consideration to the actual facts of the case. These directions embody the rule applicable to the situation, correctly embrace the elements of the case bearing on the question at issue, and sufficiently cover appellant's requests on the subject. We do not find that the court placed undue emphasis on the fact of the possible use of steam as a motive power, so misled the jury in its deliberations, and thereby caused it to return a verdict induced by passion and prejudice.

Our attention is directed to a number of exceptions to refusals to instruct and to portions of the instructions given which pertain to the duplication of damages, the defining of fair market value, the value of the strip of land actually taken, the materiality of sales of other property in connection with opinion evidence of witnesses as to market value, the opinions of witnesses as to the damages to the remainder of the farm based on the depreciation of the market value of the whole, the adaptability of the remainder of the land for platting because of the railroad crossing, and its availability for present and immediate uses. An examination fails to disclose that the jury were improperly instructed on these points and that the court improperly rejected such requests. Further elaboration of these subjects is not required.

The appellant strenuously urges that the court informed the jury that they could take an average of the fair market

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values testified to by the various witnesses as the actual market value of the property involved. We do not deem the court's charge on this point susceptible of this interpretation. The jury were informed that they were not to agree in advance to add such values as fixed by the several witnesses, to divide the total by the number of witnesses, and to adopt the result as the true value; but they were instructed "to consider all the credible evidence, facts, and circumstances in the case, and therefrom find and determine the fair market value of the land taken and the depreciation, if any, to the fair market value of the land not taken." This is an appropriate and correct submission of this question, and no error was committed in refusing the instructions requested by the defendant on this question.

A review of the whole evidence and the alleged exceptions convinces us that the court committed no prejudicial error and that the verdict is not contrary to the clear preponderance of the evidence.

By the Court.—Judgment affirmed.

DOHMEN, Appellant, vs. ESTATE OF BLUM, Respondent.

January 6—January 26, 1909.

Evidence: Account books: Items of charges for money: Witnesses: Competency: Transactions with persons since deceased: Memoranda: Statutes: Construction.

1. On the trial of a claim consisting of two items of $150 each for money loaned, filed against a decedent's estate, the claimant's books of account, verified under the calls of sec. 4186, Stats. (1898), are properly excluded, since the items fall within the exception of sec. 4187, excluding entries of items of money delivered at one time exceeding $5.
2. In such case, by reason of the statute rendering the plaintiff incompetent to testify to transactions or communications per-

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sonally had with the decedent, plaintiff could not use the books as memoranda to refresh his memory and then testify to the transactions.

3. Neither were such books admissible under sec. 4189, Stats. (1898), since that section refers to entries made in a book not strictly a book of account, and the books were identified as belonging to the class mentioned in sec. 4186, and produced by a party to the cause in his own behalf.

4. In such case, even if one cash item was represented by a written order drawn upon another party indebted to the plaintiff, which was given to the deceased and cashed by him, it is but another method of delivering money to the deceased and within the exception of sec. 4187, Stats. (1898).

[5. Whether the books of account mentioned in sec. 4186, Stats. (1898), properly verified, would in any case be evidence of a loan of money as a separate transaction, not determined.]

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Arthur Cotzhausen,* and for the respondent on the briefs of *John C. Slater.*

Among other references upon the part of the appellant were the following: Secs. 4186, 4187, 4189, Stats. (1898); Jones, Ev. (2d ed.) pp. 718, 719; *Milwaukee T. Co. v. Warren,* 112 Wis. 505, 87 N. W. 801; *Kelley v. Crawford,* 112 Wis. 368, 88 N. W. 296.

Among other references upon the part of the respondent were the following: Sec. 4069, Stats. (1898); *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Winner v. Bauman,* 28 Wis. 563.

TIMLIN, J. The appellant presented in the county court a claim against the estate of John W. Blum for two items of $150 each for money loaned. The claim was disallowed, and upon appeal to the circuit court the cause retried, the latter court again finding against the plaintiff. To prove his claim against the estate of John W. Blum the plaintiff offered in evidence two books of account, one containing the

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following entries: "May 26, 1900, paid to Rev. Blum $150; paid to Rev. Blum $150;" the other containing the following entries: "May 26, 1900, borrowed to Rev. Wm. Blum $150; borrowed to Rev. Wm. Blum $150 order on Leroy church." The plaintiff is an architect, who had rendered services in the erection of a new church building for a congregation of which Rev. John W. Blum was pastor. These books of account were verified by the testimony of the plaintiff to the following extent: The books in question were books of account kept by plaintiff. They contained entries referring to John W. Blum, deceased. The entries were made by plaintiff in the usual course of business, contemporaneous with the transactions to which they relate, are the original entries and in the handwriting of the witness, and were true and correct to the best of the knowledge and belief of the witness. This was an attempt to make the books competent evidence under sec. 4186, Stats. (1898), because they were produced by a party to the cause. They were account books and kept for that purpose, and they contained the original entries of charges for goods or other articles delivered; but as to the items in question they fell within the exception of sec. 4187, Stats. (1898), because the entries related to items of money delivered at one time exceeding $5.

By reason of the law rendering the plaintiff incompetent to testify to transactions or communications personally had with Rev. John W. Blum, deceased, the plaintiff could not use the books as memoranda to refresh his memory and then testify to the transaction. The appellant, however, contends that the five-dollar limitation above mentioned does not apply to books admissible under sec. 4189, Stats. (1898), and that under the latter section the books in question were competent evidence. But the books could not come within both sections. Sec. 4189 renders competent only "entries in a book or other permanent form other than those mentioned in secs. 4186 and 4189*b*." Any book of

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the kind mentioned in sec. 4186, produced as there provided, is not made competent by sec. 4189. The latter section refers to a different class of entries made in a book, or other permanent form not strictly a book of account, and made by some person other than the party to the cause, his agent, servant, or clerk in his behalf. The books in question being identified as belonging to the class mentioned in sec. 4186, and having been produced by a party to a cause in his own behalf, were not made competent by sec. 4189. On the other hand, they were expressly excluded by the terms of sec. 4189.

It is further contended that one of the items of $150 was not an item of cash, but is represented by a written order drawn upon another party indebted to the plaintiff, which was given to the deceased and cashed by him. We consider this another mode of delivering money to the deceased similar to a payment by check, and within the statute which declares that such books shall not be admitted as testimony of any item of money delivered at one time exceeding $5.

There being no other evidence sufficient to support the claim of the plaintiff, the circuit court properly ruled in favor of the defendant. It is not intended to commit this court to the view that books of account mentioned in sec. 4186, Stats. (1898), properly verified, would in any case be evidence of a loan of money as a separate transaction, but that question is left undecided.

By the Court.—Judgment of the circuit court is affirmed.

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STENBOM vs. BROWN-CORLISS ENGINE COMPANY, Respondent, and RICHARDS, Receiver, Appellant.

January 6—January 26, 1909.

Indemnity insurance: Privity: Right of action: Conditions precedent:* Bona fide *compliance.

1. Under a policy of insurance indemnifying the defendant corporation against loss by reason of injuries suffered by its employees, of whom plaintiff was one, the policy providing, "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment, and after trial of the issue," there is no privity of contract between the insurer and the employee, and the latter cannot reach the proceeds of such policy in an action brought directly against the insurer.
2. While there might be fulfilment of the condition precedent to the right to maintain an action on such policy by payment otherwise than in money, such payment must be made and accepted in good faith and there must be a *bona fide* settlement and satisfaction of the judgment secured by the injured employee.
3. Proceedings taken by the employee in attempting to subject such policy to his judgment secured against the defendant corporation, the corporation having been adjudged a bankrupt after the instant action had been brought, are *held* to have been a mere subterfuge resorted to for the purpose of making a nominal compliance with the terms of the insurance contract.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This action was brought to recover damages for a personal injury sustained on April 10, 1905, and on January 15, 1907, judgment was rendered in plaintiff's favor for $10,099.58. After the action was commenced and on November 14, 1905, the defendant was adjudicated a bankrupt and a receiver in bankruptcy was duly appointed. At the

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time of plaintiff's injury the defendant held a liability policy of insurance which indemnified the holder against loss by reason of injuries suffered by an employee, in a sum not exceeding $5,000 for any one accident, and provided that the company would, at its own cost and expense, assume the defense of any action brought on account of such injury. Among other things the policy provided that it indemnified the holder "against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employee or employees of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given." The policy further provided:

"No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment, and after trial of the issue."

It is conceded by the parties that the claim of the plaintiff could not be proved in the bankruptcy court before judgment thereon was obtained in the state court, and that at the time of the rendition of the judgment the time within which it might be filed as a claim in the bankruptcy proceedings had expired. Shortly after the rendition of the judgment in plaintiff's favor an execution was issued thereon and was returned unsatisfied, whereupon supplementary proceedings were instituted and a receiver of said defendant as judgment debtor was appointed by a circuit court commissioner. On February 9, 1907, such receiver filed a petition in the bankruptcy court, praying that the trustee in bankruptcy should be ordered to assign and turn over to such receiver the aforesaid indemnity policy, which petition was granted. Thereafter demand for payment was made upon the insurer

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by the receiver, which demand was not complied with. On February 19th the receiver filed a petition in the circuit court, alleging, among other things, that the plaintiff was ready and willing to compromise and settle his claim for $5,000, and would accept the receiver's promissory note for such sum in settlement and satisfaction of the judgment. Upon the filing of such petition the court made an *ex parte* order directing the receiver to execute a demand, promissory, judgment note to the plaintiff in settlement of such judgment and authorizing the receiver to commence suit on the policy of insurance. The note was executed and delivered to plaintiff and he satisfied his judgment, whereupon the receiver commenced an action against the insurance company to collect the amount alleged to be due upon the policy. After such action was commenced the *Brown-Corliss Engine Company* moved for an order vacating and setting aside the *ex parte* order authorizing the settlement and the execution of the promissory note and the commencement of the action against the insurance company. This motion was granted, and from the order granting the same the receiver prosecutes this appeal. The error assigned is that the court erred in making such order.

For the appellant there was a brief by *Rubin & Zabel* and *Wallace J. Ingalls,* attorneys, and *W. B. Rubin,* of counsel, and oral argument by *Mr. Rubin* and *Mr. Ingalls.*

For the respondent there was a brief by *Charles A. Vilas,* attorney, and *Robert N. McMynn,* of counsel, and oral argument by *Mr. McMynn.*

BARNES, J. The authorities seem to be quite uniform to the effect that, under a policy of indemnity insurance such as that here involved, there is no privity of contract between the insurer and the employee, and the latter cannot reach the proceeds of such policy, at least in an action brought directly against the insurer. *Allen v. Ætna L. Ins. Co.* 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. N. S. 958; *Connolly*

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v. Bolster, 187 Mass. 266, 72 N. E. 981; *O'Connell v. N. Y., N. H. & H. R. Co.* 187 Mass. 272, 72 N. E. 979; *Carter v. Ætna L. Ins. Co.* 76 Kan. 275, 91 Pac. 178, 11 L. R. A. N. S. 1155; *Cushman v. Carbondale F. Co.* 122 Iowa, 656, 98 N. W. 509; *Beyer v. International A. Co.* 115 App. Div. 853, 101 N. Y. Supp. 83; *Frye v. Bath G. & E. Co.* 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444; *Allen v. Gilman,* 137 Fed. 136.

No good reason is apparent why the payment which the contract obligates the assured to make as a condition precedent to his right to maintain action upon the policy might not be made otherwise than in money, provided such payment is made and accepted in good faith and there is a *bona fide* settlement and satisfaction of the judgment secured by the injured employee. *Kennedy v. Fidelity & C. Co.* 100 Minn. 1, 110 N. W. 97. Neither do we attach any particular significance to the fact that the suit is brought by a receiver instead of in the name of the beneficiary designated in the policy. *Travellers Ins. Co. v. Moscs,* 63 N. J. Eq. 260, 49 Atl. 720.

The receiver here was not appointed to administer the affairs of the insolvent corporation for the benefit of creditors generally, but was appointed in a proceeding supplementary to and in aid of an execution issued at the instance of a single creditor and for the sole purpose of collecting the judgment in this action. With the exception of the policy referred to, apparently all of the assets of the insolvent were turned over to the trustee in bankruptcy for the benefit of creditors having provable claims against it. The policy by its terms was of no value to the defendant herein, or to any one else, until the judgment of the plaintiff was satisfied.

Considering the purpose for which the receiver here was appointed, if he could pay the judgment by giving his note, and such note was received in satisfaction of the judgment, and it was satisfied, it would seem that the object for which he was appointed had been accomplished, and any further

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proceeding on his part was unnecessary to discharge his legitimate functions. However this may be, the proceeding was certainly novel. On its face the action taken was a mere subterfuge resorted to for the purpose of making a nominal compliance with the terms of the insurance contract. The contract was one which the parties thereto had a right to make, and it would be trifling with its terms for a court to hold that the shadowy payment here attempted to be made conformed to its requirements. There was no *bona fide* payment of the judgment. The fictitious payment resorted to is too thinly veiled to stand the test of judicial scrutiny.

It may well be doubted whether the defendant in this action had any right to complain of the *ex parte* order authorizing the giving of the note and the compromise of the judgment and the bringing of the action against the insurance company. Whether it had or not, it was clearly within the province of the court to set aside the former *ex parte* order as soon as attention was called to its indefensible character.

It is well settled that the matter of authorizing receivers to execute notes in proper cases, and of authorizing them to commence actions, rests in the sound discretion of the trial court, and that orders in reference to such matters made by such courts will be reversed only when there is an abuse of such discretion. *Neeves v. Boos,* 86 Wis. 313, 56 N. W. 909. The case might well be disposed of upon this rule of law; but lest a decision upon this point should be construed as intimating that the *ex parte* order of the trial court might be sustained if the trial court had refused to set it aside, we deemed it best to consider the question on its merits rather than to simply hold that there was no abuse of discretion in making the order appealed from.

By the Court.—Order affirmed.

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ANDERSON, Respondent, vs. HORLICK'S MALTED MILK COMPANY, Appellant.

January 7—January 26, 1909.

Dismissal and nonsuit: Voluntary nonsuit after verdict: Rights of adverse party: Trial: Instructions to jury: Necessity of requests for instructions: Evidence: Positive and negative evidence: Appeal and error: Review: Erroneous exclusion of evidence.

1. The right to a judgment on the verdict or to appeal from a denial thereof having become fixed by the verdict, it cannot rightly be taken away by a voluntary discontinuance.
2. A new trial having been granted, even if the right to discontinue the action is thereby revived, such right is not absolute, but requires the assent of the court.
3. Where as the result of a full trial a party, on the face of the record, is entitled to judgment, and a stay of proceedings has been granted to give reasonable opportunity for the preparation and service of appeal papers, the opposite party and the court having full notice that it is intended in good faith to take an appeal, judicial assent to a discontinuance sought with the evident purpose of superseding the right of appeal should be withheld.
4. The giving of instructions to the jury applicable to the evidence, good as far as they go, with no further instructions asked by way of explanation or otherwise, is not prejudicial although the jury may have gone astray.
5. Evidence merely negative in form, in contradiction of positive evidence, does not call for explanation to the jury as regards its definition or comparative weight.
6. Where the evidence upon the negative takes the form of recollection and positive denial based thereon, it is affirmative, in effect, rather than negative, under the rule for comparative weight of the two classes of evidence, notwithstanding its negative form.
7. In an action for personal injuries, the controversy being as to whether a bell or other signal was sounded or not, there being positive evidence that it did, and a witness having testified that he did not hear the bell or signal sounded, a situation is presented calling for instructions on the question of positive and negative evidence and their comparative weight.

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8. A phrase of an instruction to the jury: "Where two witnesses directly contradict each other, and the veracity of neither is impeached, *the presumption of truth* is in favor of the witness who swears affirmatively," while disapproved for use of the words "presumption of truth," in connection with the other parts of the charge is *held* not to have misled the jury. TIMLIN, J., dissents.
9. Where there was positive evidence that an elevator bell rang and that the witness could have heard it, but he testified that he did not, it is harmless error to sustain objections to questions involving mere opinions as to the witness's ability to hear the bell which were as capable of being formed by the jury as the witness.
10. In an action for personal injuries received by falling down an elevator shaft, a question of the special verdict inquiring as to whether the entrance to the elevator was *reasonably* guarded, stated in the opinion, is *held* to have substantially covered the calls of sec. 1636*j*, Stats. (1898), requiring all elevators to be "*securely* guarded and fenced."

APPEALS from orders and from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

Action to recover for personal injuries claimed to have been caused by defendant's negligence.

The plaintiff was injured by going through the open door of an elevator shaft when the car was not in place and falling down the shaft. The negligence complained of, made the subject of inquiry on the evidence, was as indicated in the verdict. The jury found as follows:

"(1) Did the signal bell in the elevator fail to ring when the elevator moved upward from the first floor immediately before the plaintiff fell down the shaft? *A.* No.

"(2) If you answer the first question 'Yes,' then was such failure to ring caused by defect or want of repair? *A.* ——.

"(3) If you answer the first and second questions 'Yes,' could the defendant in the exercise of ordinary care have discovered such defect or want of repair in time to have remedied the same before the accident? *A.* ——.

"(4) If you answer the first, second, and third questions

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'Yes,' was the defendant negligent in failing to put said bell in proper repair before the accident? *A.* ——.

"(5) Did the defendant negligently fail to reasonably guard the entrance to the elevator at the scratching room floor at the time of the accident? *A.* No.

"(6) If you answer the fourth and fifth questions, or either of them, 'Yes,' was such negligence the proximate cause of plaintiff's injury? *A.* ——.

"(7) Was the plaintiff guilty of any want of ordinary care which contributed to produce his injury? *A.* No.

"(8) If the court shall determine that the plaintiff is entitled to recover, in what sum do you assess his damages? *A.* $2,500."

There was a motion for a new trial, granted because of supposed harmful error in the charge and such error in rulings on evidence. After such granting, defendant, upon due notice, applied to the court for an order fixing the amount of an undertaking to stay proceedings pending the result of an appeal from the order to this court. The appropriate order was made, but before the time limited for appealing expired the court, without notice to defendant's counsel, on application of the plaintiff's counsel, rendered judgment dismissing the cause without prejudice. Defendant seasonably moved the court for a vacation of such judgment, which motion was denied. An appeal was then taken from the first order and a second appeal from the judgment and from the second order.

For the appellant there was a brief by *Aarons & Niven*, attorneys, and *Quarles, Spence & Quarles,* of counsel, and oral argument by *J. M. Niven* and *W. C. Quarles.*

Wallace Ingalls, for the respondent.

MARSHALL, J. Sec. 2856, Stats. (1898), provides that: "The plaintiff shall have no right to submit to a nonsuit after the argument of the cause to the jury upon the testimony shall have been concluded or waived." It will readily be seen, without discussion, that appellant was entitled, as mat-

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ter of right, after the verdict was rendered, to have the question of its right to judgment thereon determined by the trial court and, if necessary, by this court. It is quite likely that the learned trial court supposed that, a new trial having been granted, the case stood as regards the right of discontinuance the same as before it was submitted to the jury. The right to judgment upon the verdict or to appeal from a denial thereof became fixed upon the verdict being rendered and could not rightly be taken away by a voluntary discontinuance. Moreover, if the right, so called, of discontinuance was revived by the order for a new trial, still it was not absolute. An application in that regard required assent of the court, so far as judicial action was necessary to save the rights of the adverse party from being unduly prejudiced. *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 233, 82 N. W. 158. The notion that a plaintiff may, after bringing the defendant into court and compelling him to submit to the disturbances incident to the formation of issues and preparation for trial, under all circumstances, discontinue, being liable only for taxable costs, regardless of the situation in which it may leave the adverse party, is all wrong, as suggested in the case cited.

True, the privilege of discontinuance is so commonly granted, within statutory limitations, that only in rare instances would any effort to prevent it be effective. The granting, generally, is as matter of course. So it is commonly spoken of as a right, but it is not a right absolute, as before indicated. It is to be granted or withheld according to the justice of the situation, which might be such as to render assent an abuse of discretion. Such was the case here.

As the result of a full trial, appellant, on the face of things, was entitled to judgment. Nothing stood in the way till the adverse ruling of the trial court after verdict on questions of law. A stay of proceedings being then granted to preserve the *status quo* pending an appeal, and to give

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reasonable opportunity for the preparation and service of appeal papers, and the amount of the bond to stay proceedings till the termination thereof having been duly fixed, and respondent's counsel and the court having full notice that defendant intended in good faith to challenge the order for a new trial, it was clearly wrong for plaintiff to have judicial assent to a discontinuance sought with the evident purpose of superseding the right of appeal. We have no hesitancy in holding that such action was highly improper. It is not thought the learned trial court committed the error, conscious that it was within discretion to grant or refuse the discontinuance. It is supposed the thought must have been that plaintiff was entitled as matter of right to dismiss his action.

The foregoing brings us to consider the supposed errors of law which led to granting the new trial.

The first of such supposed errors is that the court improperly instructed the jury on the subject of positive and negative evidence.

There was no explanation to the jury as to what constitutes negative evidence, within the rule as regards the comparative weight between such and positive evidence, and none was requested. Without such request, if there were a situation legitimately calling for an application of the rule, and it was properly phrased, there was no error. It is familiar law that, if instructions are given applicable to evidence, good as far as they go, and no further instructions are asked, and yet, for want thereof, by way of explanation or otherwise, the jury may have gone astray, the losing party is remediless. The prejudice, if any, is to be regarded as chargeable to fault of the losing party. *Cook v. Racine,* 49 Wis. 243, 5 N. W. 352; *Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 93 N. W. 837; *Taylor v. Seil,* 120 Wis. 32, 97 N. W. 498; *Pumorlo v. Merrill,* 125 Wis. 102, 114, 103 N. W. 464; *Coppins v. Jefferson,* 126 Wis. 578, 585, 105 N. W.

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1078; *Van de Bogart v. Marinette & M. P. Co.* 127 Wis. 104, 112, 106 N. W. 805.

True, evidence merely negative in form in contradiction of positive evidence does not call for application of the rule under discussion. For instance, testimony that the bell in the elevator did not ring, contrary to the evidence that it did ring, is negative in form but is an affirmation of fact that the bell did not ring. It is as affirmative as the evidence that the bell did ring. One affirms that the bell rang; the other that it did not. The same would be true in case of a witness, contradicting another who testified positively to seeing a certain act, testifying that it did not occur.

It is not to be wondered at that there is some confusion of understanding on this subject. In *Kelly v. Schupp,* 60 Wis. 76, 18 N. W. 725, in contradiction of positive evidence of a witness that an alleged agreement was made, the adverse party testified just as positively that it was not made. The court charged the jury that such negative testimony, in form, was not negative within the rule under discussion, and on the appeal this court said: "It clearly was," referring to *Ralph v. C. & N. W. R. Co.* 32 Wis. 177. That case is merely to the effect that when a person testifies positively in form that an alleged transaction did not occur under such circumstances that it amounts to no more than that he does not recollect of any such occurrence, his testimony is negative evidence within the rule, notwithstanding the positive form. Later, in perfect harmony with *Cook v. Racine, supra,* and many other cases in this court and elsewhere that mere want of recollection is negative testimony within the rule, the court decided that an assertion, as from recollection, that a thing affirmed on one side to have occurred, did not occur, is not such, but on the contrary is positive evidence. That was expressly held in *Elkins v. Kenyon,* 34 Wis. 93; *Sobey v. Thomas,* 39 Wis. 317; *Shekey v. Eldredge,* 71 Wis. 538, 37 N. W. 820; *Joannes v. Millerd,* 90

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Wis. 68, 62 N. W. 916; *Alft v. Clintonville,* 126 Wis. 334, 105 N. W. 561. In the latter case it was said:

"The mere form of the question put to the witness does not always determine whether his answer shall be regarded as positive or negative testimony." "Thus it often happens that testimony which is negative in form may be really affirmative in essence and effect, within the real meaning and purpose of the rule."

So it is apparent, as suggested in *Joannes v. Millerd, supra,* that the very valuable rule under discussion for weighing evidence is liable to be prejudicially misused if the real character of negative evidence, contemplated thereby, is not understood. It relates only to evidence of a witness who had opportunity to see an occurrence, testified by some other witness to have occurred, that he did not see it, or of one who had opportunity to hear or know of an occurrence, testified positively by some other witness to have happened, that he did not hear it or recollect it. When the evidence upon the negative takes the form of recollection and positive denial based thereon, it is affirmative, in effect, rather than negative, under the rule for the comparative weight of the two classes of evidence, notwithstanding its negative form.

In the light of the foregoing it will be seen by reference to the evidence in this case that a situation was presented to the trial court calling for application of the rule mentioned. The controversy being as to whether the elevator bell was sounded or not, after plaintiff stepped back from the elevator opening to get his truck, there having been positive evidence that it did—he testified substantially like this: I did not hear any bell ring. I did not hear any warning when I was backing up into the elevator shaft. I say the bell did not ring because I did not hear it. That is all I know about it.

The instruction given is as follows:

"It is a general rule of evidence that affirmative or positive evidence is stronger than negative evidence. In other

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words, that the testimony of a credible witness that he heard the elevator bell ring when the elevator moved upward immediately before the happening of the injury to the plaintiff is stronger than that of an equally credible witness who with the same opportunities testifies that he did not hear the elevator bell ring at the same time.

"Where two witnesses directly contradict each other, and the veracity of neither is impeached, the presumption of truth is in favor of the witness who swears affirmatively. You are instructed, therefore, that the positive testimony of a single witness who testifies that the bell rang on the occasion in question is entitled to more weight than that of two witnesses, equally credible, who testify negatively, that they did not hear it ring.

"Of course, you must bear in mind in applying this rule that much depends upon the circumstances, such as the opportunity of the witnesses for knowing, and the attention which they gave or which it appears to you from the evidence they probably gave, under all the circumstances shown. The mere fact that one witness testifies contrary to another does not discredit either. The credibility of all witnesses, as I said before, and the weight to be given to the testimony of each, is wholly for your consideration and determination. . . ."

With an exception hereafter noted the quoted language is substantially the same as has been repeatedly approved by this court. As good an illustration as any is *Draper v. Baker,* 61 Wis. 450, 21 N. W. 529, referred to by appellant's counsel:

"Positive testimony of a small number of witnesses that they saw or heard a given thing occur, will outweigh the negative testimony of a greater number of witnesses that they did not see or hear it, provided the witnesses are equally credible; but in connection with this instruction should be considered the relative means or opportunity of the several witnesses to see or hear the occurrence, and that it should be carefully kept in mind that it only applies when the witnesses are equally credible."

The following are but a few of the many other cases where similar language was used or approved: *Eilert v.*

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G. B. & M. R. Co. 48 Wis. 606, 4 N. W. 769; *Pennoyer v. Allen,* 56 Wis. 502, 14 N. W. 609; *Wickham v. C. & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982; *Ives v. Wis. Cent. R. Co.* 128 Wis. 357, 107 N. W. 452.

The language of the instruction, the positive testimony of a credible witness as to a particular matter is entitled to greater weight than the negative testimony of an equally credible witness as to the same matter, with a proper explanation, which was given, is not subject to criticism. It merely stated the rule in the ordinary way of phrasing it. Jones, Ev. § 898 (901); *Wickham v. C. & N. W. R. Co., supra.*

The only portion of the court's instruction challenging particular attention is this: "The presumption of truth is in favor of the witness who swears affirmatively." That must be viewed in light of the reason of the rule. The words "presumption of truth" evidently were not used with reference to the mere question of veracity; that is, as to which of the two witnesses, if either, testified falsely. That has its negative in the very limitation of the phrasing. It evidently was used with reference to the greater likelihood of the positive rather than the mere negative testimony pointing correctly to what in fact occurred, the idea being that while one cannot hear a sound which does not occur or see a thing which does not happen, it is common knowledge that there may be a sound within one's vicinity and easily within the range of his hearing or a transaction in such vicinity easily within the range of his vision, and he be entirely unconscious of it or some time thereafter fail to recollect it. So in one sense there is a presumption that the person testifying positively that he saw or heard an occurrence is right rather than one similarly situated who is only able to testify that he did not see it or did not hear it or recollect it.

So it is said in the older works on Evidence, and some of the later ones as well, the presumption is in favor of human veracity operating to support the affirmative. In *Hepburn*

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v. Citizens' Bank, 2 La. Ann. 1007, the rule is formulated from the opinion thus: "Where two witnesses, of unimpeached veracity, contradict each other, the presumption of truth is in favor of the one who swears affirmatively." That is found to have been copied substantially *verbatim* by Mr. Jones in his valuable work on Evidence at sec. 898 (901), the language being used as another way of stating that the positive testimony of one credible witness as to a fact in issue is entitled to greater weight than the testimony of another equally credible witness, with equal opportunity for knowing the truth, that he did not hear or see or recollect as the case may be. The rule is given with both phrasings and each as a synonym for the other with appropriate illustrations.

There is good reason for use of the word "presumption," merely in the sense that, as a matter of law, all other things being equal, it being understood that whether they are so equal or not is for the jury to determine preliminary to applying the rule, positive should prevail over negative testimony. That does not give any greater dignity to the positive testimony than to merely say that as a matter of law it is to be preferred over the negative, as has often been said by this and other courts. In *Delk v. State,* 40 Tenn. 79, this language, substantially, was used: When two witnesses of equal credibility and opportunity for hearing an occurrence testify, one positively that he heard it and the other that he did not hear it, the former is entitled to prevail over the latter. Again in *Farmers' & M. Bank v. Champlain T. Co.* 23 Vt. 186, it was stated as a rule of law that in weighing contradictory evidence, other things being equal, positive preponderates over negative evidence, but in giving such rule to a jury care should be exercised to place before them the facts necessary to its proper application. Any number of like illustrations might be given.

So it will be seen that the learned court, in using the term

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"presumption of truth," did not venture to depart from the phrasing of the rule commonly adopted by this court, and so repeatedly approved that it can be used by trial courts with perfect safety, carelessly, or for the mere purpose of indulging in originality.

While a trial judge, as an original matter, may be able to state a rule of law more concisely and in language more easily understood by the ordinary juror than the examples given by this court for stating the same rule, such departures are to be avoided, generally speaking, since they are quite liable to result in just the difficulty we are now dealing with. The learned circuit judge in this case must be acquitted of taking any responsibility for a new phrasing of an important rule, as he copied, word for word, from the text in Jones on Evidence, which has come to be the common handbook for trial judges in this state and well merits the distinction. The copied language was used in connection with a common statement of the rule before and again after, showing, unquestionably, that the three separate phrasings were given as meaning the same thing, as the jury in all likelihood must have understood it. That they may well have done so seems evident since some courts and two eminent text-writers are committed to that idea, as we have shown.

The foregoing is reinforced by the common meaning of the word "presumption." Lexically, in the ordinary, it means "The act of believing upon probable evidence; opinion; evidence probable but not conclusive." Webst. Dict. From the technical legal standpoint, except as provided by statute, it means inference which a reasonable person would as a rule draw from given circumstances. Such, of course, are rebuttable, being mere presumptions of fact. Again, the inferences which spring from given circumstances as matter of law which may in some cases be rebuttable and some cases not. 2 Bouv. Law Dict. One will readily ap-

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ply those definitions discriminately to the word "presumption" as it was used in this case, to the effect merely that, as matter of law, positive evidence, all other things being equal, is entitled to prevail over mere negative evidence.

Notwithstanding what has been said we do not approve of use of the term which has led to this discussion. It is not commonly used. It has never been used in any other case reviewed by this court, so far as we can discover. It being rather of an unusual way of phrasing familiar law, perhaps it is unfortunate, after giving the common method, that the uncommon one was incorporated in the late work on Evidence as in all respects reliable.

Probably the words "presumption of truth" might possibly convey a different meaning to laymen, ordinarily, than the one appropriate thereto, under the circumstances the term is used in the books and was used in the instruction. Any person of common understanding can readily comprehend the ordinary statement. To add that the presumption of truth, etc., while abstractly correct, might under some circumstances mislead. We strongly advise its use be not indulged in. However, we do not reach the conclusion that there is any probability the jury may have been misled in this case, since, as before indicated, the common phrasing of the rule was twice used in connection with the peculiar language, all as meaning the same thing.

The further supposed error lies in the rejection of several questions propounded to appellant, such as: If the bell sounded at that time would you have heard it? Was it such a sound as to be readily heard while you were in the position of pulling in your truck into the elevator? From what you know, could you have heard this bell had it rung when you were backing into the shaft? It will be observed that the questions involve mere opinions, which were as capable of being formed by the jury as the witness, since they had been put in possession of all facts as to the location of appellant

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with reference to the elevator at the time in question and as to the nature of the bell signal as regards being such as to attract the attention of a person within the range occupied by appellant. On those grounds, as appears satisfactorily from the record, the evidence was rejected, and we think without harmful error. Quite certainly so because the evidence was not offered for the purpose of showing that the bell might have sounded and appellant not have heard it because of not being within hearing distance. It was offered to show that, though he was within such distance, he did not hear the bell. That he was within such distance there was no dispute. He had already testified, over and over again, that he did not hear it. So it is not perceived that the evidence would have, had it been received, added a feather's weight to the evidence already given.

Counsel for respondent invokes the benefit of his exception to a refusal of the court to submit a question embodying, literally, the language of sec. 1636*j*, Stats. (1898), to the effect that under such circumstances as the jury might have found existed in this case all elevators "shall be securely guarded and fenced." The court submitted a question, which was excepted to as not conforming strictly to the statute, of whether the entrance to the elevator was reasonably guarded. In respect thereto the jury were instructed it was incumbent on plaintiff to show that defendant did not reasonably guard the elevator entrance. No exception was taken to the charge, and none to the question, except because the wording thereof did not conform literally to the statute.

What would constitute a reasonable guarding of an elevator entrance under the circumstances was determinable with reference to the mandate of the statute that it must be securely guarded. Nothing short of that would be a reasonable guarding. The requirement of the statute, as we view the matter, was substantially covered.

Thus it seems all questions presented must be resolved

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in favor of appellant. The judgment must be reversed and the cause remanded for entry of judgment in defendant's favor upon the verdict.

By the Court.—So ordered.

TIMLIN, J. I feel obliged to dissent. I think the order granting a new trial should be affirmed. The court below erred in charging the jury as follows:

"Where two witnesses directly contradict each other and the veracity of neither is impeached, the presumption of truth is in favor of the witness who swears affirmatively."

The circuit court thought this to be error and granted a new trial for that reason. He is now reversed and admonished that he should not use this language in charging the jury, and it is suggested that he should "phrase" his ideas as directed by this court.

These hortatory decisions lecturing the trial courts, and requiring them to clothe their ideas and their definitions in set phrases settled for them by this court, seem to me productive of confusion. When another case comes up in which the circuit court used the same or equivalent language in his charge to the jury we must do one of four things: (1) Continue these hortatory exercises; (2) pass it unnoticed; (3) approve of it; (4) declare it prejudicial error and disapprove of it and reverse the decision below. If we do the latter we are not administering the law impartially in all cases.

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HOPKINS, Respondent, vs. RACINE MALLEABLE AND WROUGHT IRON COMPANY, Appellant.

January 7—January 26, 1909.

Contracts: Continuing offer: Consideration: Mutuality: Revocation: Damages.

1. **Consideration in the form of mutuality being essential to the validity of a contract, a wholly executory contract for mutual acts is of no binding force upon one party unless and until the other has become bound thereby.**
2. **Such rule is subject to modification to the extent that an executory promise by one party may be considered a continuing offer of performance, which, when accepted, in whole or in part, by the other party, becomes a contract *pro tanto* to the extent of the acceptance.**
3. **Such modification, however, is carried no further than to bind the offerer so long as he sees fit to keep the offer open.**
4. **A continuing offer may be revoked at any time except as to acceptance thereunder prior to the revocation.**
5. **After the revocation of a continuing offer, no damage accrues to the offeree for refusal to comply with subsequent acceptances.**

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

The plaintiff having secured a patent upon a certain farm gate and having had some undisclosed negotiation with the defendant, a manufacturer of malleable irons, the latter on March 10, 1905, mailed to him the following writing:

"HOPKINS' GATE CONTRACT.

"The *Racine Malleable and Wrought Iron Company* of the city of Racine, state of Wisconsin, hereby agrees with *Floyd Hopkins* of the town of Belvidere, county of Boone, state of Illinois, to furnish, at any time hereafter during the life of the patent, castings for the patent improved farm gate of said *Hopkins,* known as the Hopkins Gate, patented January 3, 1905, as follows, to wit: . . . We agree to furnish the above named castings for forty cents per set at our shops to be shipped to any point of the United States or Canada, the

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price aforesaid to be for cash at Racine, Wisconsin. The said company further agrees that it will furnish the above trimmings to any person or persons to whom the said *Hopkins* may make sale of any territory for his said *Hopkins* improved patent farm gate, provided the said *Hopkins* shall indicate by his order who such persons or purchasers are, but with the understanding that said *Floyd Hopkins* is not liable, or held liable for any castings so furnished to any purchaser or purchasers of territory from him."

There was no reply, but from time to time, up to July, 1906, the plaintiff ordered castings in quantities from fifty to 150 sets, and they were supplied by the defendant, who seems to have manufactured a quantity in order to be able to furnish them as ordered. On April 30, 1906, defendant wrote plaintiff that by reason of reorganization of its business it was a question whether it could continue to make or furnish the gate castings, and that it wrote in order to give plaintiff an opportunity to find some other place to have them made; that while it still had some irons on hand, it did not care to carry on the business in the old way by carrying stock and shipping all over the country when wanted; that it had no room for storage nor facilities for packing and shipping. Again, on October 29, 1906, the defendant wrote him that it had approximately 400 sets of castings on hand, but was unwilling to continue the business after that stock was exhausted by carrying other stock, saying that the plaintiff would have to make arrangements to carry the stock elsewhere, and also stating:

"We do not object to making your castings for you, but after the goods are made they must be shipped out of here. We cannot carry a stock. . . . Orders that are placed after the stock on hand now is exhausted will be billed at revised prices."

December 14th it wrote again:

"The time is drawing near when we can no longer accept such contracts. . . . What stock we have made up, which is about 350 sets, we will close out, but we can no longer

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make these castings and carry them in stock for you, and have you draw them from this stock. You will have to make arrangements to carry the stock elsewhere."

On December 27, 1906, plaintiff mailed to the defendant, what is called an order, the following letter:

"I wish one thousand sets of Farmer Hopkins' Gate castings patented January 3, 1905, manufactured and ready for delivery May 1, 1907. Will give you shipping directions later."

To which the defendant replied January 30th: "It is not possible for us to make the thousand set of Farmer Hopkins' Gate castings at the present time"—asserting as a reason the quantity of other work. And again, on February 22, 1907, referring to an intervening conversation, the defendant reaffirmed the letter of January 30th, and said: "We are unable to make up the order for you, and as conditions are at present, we could give you little or no encouragement for making up these goods in the future." The conversation referred to was claimed to contain a reiteration of the statement that the 350 sets on hand would be furnished as called for. Plaintiff, on April 9, 1907, entered into a contract with another manufacturer to manufacture a thousand sets of castings for the same purpose, of slightly greater weights and size, and with some modification of structure, at a price of fifty-five cents per set, to be paid when the manufacture was complete. Up to the time of the trial, January 13, 1908, the total ordered shipped by plaintiff from this 1,000 sets was 200 sets. Plaintiff brought suits for damages for defendant's refusal to comply with the order of December 27, 1906, and judgment was rendered by the court, without a jury, for damages at the rate of fifteen cents per set, or $150, from which the defendant appeals.

For the appellant there was a brief by *Kearney, Thompson & Myers,* and oral argument by *W. D. Thompson.*

For the respondent there was a brief by *Thompson & Harvey,* and oral argument by *F. Thompson.*

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DODGE, J. No principle is more elementary in the law of contracts than that consideration is essential to their validity, and that a wholly executory contract for mutual acts is of no binding force upon one party unless and until the other has become bound thereby. In such a contract mutuality is an essential of validity. *Dodge v. Hopkins,* 14 Wis. 630; *Moulton v. Kershaw,* 59 Wis. 316, 18 N. W. 172; *Teipel v. Meyer,* 106 Wis. 41, 81 N. W. 982. That rule has received modification to the extent that an executory promise by one party may be construed to evince his intention to make a continuing offer of such performance which, when accepted, in whole or in part, by the other party, becomes a contract *pro tanto* to the extent of the acceptance. Such offers are very common in the mercantile world and are a basis on which mercantile business is largely transacted. Being in a sense a departure from the fundamental principle of the necessity for consideration, in the form of mutuality or otherwise, the exception is carried no further than to bind the offerer so long as he sees fit to keep the offer open. In the present case the promise of the defendant to furnish castings was wholly executory and upon condition that the plaintiff should do acts in the future. There is not the slightest suggestion that the plaintiff ever, even in the most informal manner, bound himself to the conditions expressed in that offer. With him it was entirely optional at all times to purchase his supplies of irons wherever he chose. True, as he from time to time ordered a shipment from the defendant he became bound to pay for such shipment according to the terms of the offer, and then, for the first time, did defendant become bound to fill his order. This is the vital and fundamental distinction between the present case and the authorities from this and other courts cited by the respondent. In each of those cases there were express words on the part of the purchaser binding him to performance upon his part to the full extent responsive to

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the offer made, albeit the promise was in some of the cases ambiguous. *Shadbolt & B. I. Co. v. Topliff,* 85 Wis. 513, 55 N. W. 854; *Walsh v. Myers,* 92 Wis. 397, 66 N. W. 250; *McCall v. Icks,* 107 Wis. 232, 83 N. W. 300; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 554, 93 N. W. 459; *W. G. Taylor Co. v. Bannerman,* 120 Wis. 189, 97 N. W. 918; *Eastern R. Co. v. Tuteur,* 127 Wis. 382, 105 N. W. 1067; *Minn. L. Co. v. Whitebreast C. Co.* 160 Ill. 85, 31 L. R. A. 529; *Lima L. & M. Co. v. Nat. Steel C. Co.* 155 Fed. 77, 11 L. R. A. N. S. 713. In each of these cases were promises by the purchaser to be bound by the contract, either by acceptance or otherwise. This element of consideration in the form of mutuality being wholly lacking in the instant case, it is unnecessary to consider many other objections urged to the validity of a contract resulting from defendant's letter of March 10, 1905. We deem it clear that that letter at most constituted a continuing offer to furnish castings upon payment of the specified price and might be revoked at any time by the defendant, except as to orders thereunder prior to the revocation. The letters referred to in the statement of facts of April, October, and December, 1906, are open to no construction but that of revocation of the offer, except to the extent of the irons then manufactured and on hand, so that the plaintiff could not by an order on December 27th impose upon the defendant any duty to manufacture for him other castings at the price named in the offer of March 10, 1905, and therefore is entitled to no damages for refusal so to do.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action.

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FOOTE, Appellant, vs. HARRISON and others, imp., Respondents.

January 7—January 26, 1909.

Equity: Laches: Reasonable time: Fraudulent conveyances: Constructive notice: Appeal and error: Review: Scope: Limitation of actions: Accrual of right: Creditor's suit.

1. Equity discourages stale demands and will not aid one who has been guilty of gross laches.
2. The rule of laches is applied by a court of equity according to its ideas of right and justice and independently of any prescribed period of time, the reasonableness of the time depending upon the facts and circumstances of each particular case.
3. The record of a deed by a third person to the children of a judgment debtor is not of itself constructive notice to the judgment creditor of its fraudulent character or that the judgment debtor was an interested party to the conveyance.
4. On appeal from an order sustaining a demurrer to a complaint the appellate court cannot go beyond the facts stated in the complaint.
5. For the purposes of the statutes of limitation a cause of action in favor of a judgment creditor, to reach lands alleged to have been conveyed in fraud of creditors, is deemed to have accrued upon the discovery of the facts constituting the fraud.

APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

The plaintiff is a resident of Chicago, Illinois. November 10, 1888, the defendant *William H. Harrison* made a promissory note for the sum of $1,000, dated Richmond, Illinois, payable one year from date to the order of the plaintiff, with interest at the rate of seven per cent. November 13, 1895, judgment was rendered on this note in the circuit court for Kenosha county, and on the succeeding day the judgment was docketed in the office of the clerk of the court. Execution issued in the county of Kenosha was returned entirely unsatisfied. Thereafter an execution issued in the county of Adams, some land was attached, and a small sum was

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realized on a sale thereof. The plaintiff by this action seeks to subject to execution in favor of his judgment certain lands which are alleged to be in fact owned by the judgment debtor, although the title is in his children. At the time of giving the note practically all of the property which is involved in the present litigation, which is fully described in the complaint, was owned by the defendant *William H. Harrison,* the maker of the note. Prior to the rendition of the judgment on the note it had been sold under foreclosure decrees. Thereafter, by transfers through several parties, the title to the part of the property involved herein was conveyed May 25, 1897, to *Kirk L. Harrison, Orville E. Harrison,* and Harriet M. Harrison, children of *William H. Harrison.* Plaintiff alleges that *William H. Harrison* furnished the consideration for the transfer, that the transfer was made to his children at his direction and for the purpose of defrauding his creditors, particularly the plaintiff, and that *William H. Harrison* is the beneficial owner and is now the occupant thereof. Harriet M. Harrison married and has died intestate, leaving her husband and one child. Her husband resides in Illinois and her daughter with her grandparents on the land in controversy. *Kirk L. Harrison* and *Orville E. Harrison* and his wife reside outside of this state. The wife of *William H. Harrison* resides with him. *Laura M. Snyder,* the other defendant, is the owner of a mortgage executed by the owners of the legal title to the property.

Plaintiff alleges that on July 17, 1907, he first knew that the land herein involved had been conveyed to the three children of *William H. Harrison;* that by inquiry immediately thereafter he first learned that the defendant *William H. Harrison* was the real owner and was in control and possession thereof; that he had paid the consideration for its transfer to his children and had fraudulently procured the making of the deed to his children. A demurrer to the original complaint was sustained by the court and plaintiff

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given leave to file an amended complaint upon the usual terms. The amended complaint states the facts as given above. A demurrer to the amended complaint was sustained upon the ground that the plaintiff had been guilty of laches in acquiring knowledge of the alleged fraudulent transactions. This is an appeal from the order of the court sustaining the demurrer.

Elwood G. Godman, attorney, and *Peter Fisher,* of counsel, for the appellant.

For the respondents there was a brief by *Cavanagh & Barnes,* and oral argument by *C. D. Barnes.*

SIEBECKER, J. The trial court sustained a demurrer to the complaint upon the ground that the facts alleged in it show that plaintiff was wanting in due diligence in the enforcement of his claim against the judgment debtor. It is a well-established rule that a court of equity will not lend its aid to a party who has been guilty of gross laches in the enforcement of his rights and that it will discourage stale demands. As declared in *Rogers v. Van Nortwick,* 87 Wis. 414, 429, 58 N. W. 762:

"A court of equity applies the rule of laches according to its ideas of right and justice, and the courts have never prescribed any specific period applicable to every case, like the statute of limitations; and what constitutes a reasonable time within which the suit must be brought depends upon the facts and circumstances of each particular case."

Under these rules the question is whether the facts alleged show that plaintiff was guilty of laches in the enforcement of his claim against *W. H. Harrison,* the judgment debtor. The facts stated are that the land in question was conveyed in May, 1897, by a third party to the children of *W. H. Harrison,* the judgment debtor, and that *Harrison* paid the consideration and has a beneficial interest in the property. It is not stated when *Harrison* went into posses-

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sion of the property, or how long he had been in actual control and possession of the premises prior to July 17, 1907, when plaintiff alleges he first obtained actual knowledge of the fact that *Harrison* had an interest in the property. Nor does it appear when the deed to the Harrison children was recorded. Upon the assumption that it was recorded soon after its execution, the question is whether plaintiff's conduct, under the circumstances, shows such laches in the matter that he should not be permitted to invoke the aid of equity to enforce his claim against this land as the property of *Harrison,* title to which is alleged to have been taken in the names of his children, through collusion with them, to hinder, delay, and defraud his creditors.

At the outset it is claimed that if the deed to the children be assumed as having been recorded soon after its execution, such record was constructive notice to plaintiff, and he was thereby apprised of facts concerning the ownership which would have led a man of ordinary diligence to make inquiry and would have led him to discover the facts he now alleges as showing a fraudulent transaction, and hence that the six-year statute of limitation began to run at the time of such conveyance. We find no warrant for such a claim in the decisions of the courts of other jurisdictions cited to our attention. Those cases wherein the recording of the conveyance was held to give constructive notice of its fraudulent character and cause the statute of limitation to run from the date of the record were conveyances wherein the grantor stood charged with having fraudulently conveyed to defraud his creditors. We need not determine whether such a rule is to be approved by this court, for we have no such case before us. The judgment debtor is not a party to the deed, nor does it appear in any way from the record that he was in any way connected with the conveyance or had any interest in the property conveyed. Under such circumstances, record of this deed cannot in any respect be said to convey informa-

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tion that *Harrison* was an interested party to the conveyance or that he had a beneficial interest in the property conveyed. We therefore hold that the record of the deed from *McConnell* to *Harrison's* children could not operate to give plaintiff constructive notice of the fraud charged in the complaint.

The question remains whether the facts alleged show that plaintiff, in the light of right and justice, was guilty of such gross laches that he in good conscience ought not to be permitted to proceed with the prosecution of this action. The conveyance to the children was executed in May, 1897, ten years and more before the action was begun. It seems that the trial court regarded the length of time from the making of the deed to the time the action was begun as sufficient in itself to show laches, upon the theory that plaintiff's ignorance of the fraud he now alleges was the result of his omission to learn of the deed to the children. We do not regard this position as tenable, for, if plaintiff soon after its execution had in fact discovered that such a conveyance had been made, it did not put him in possession of facts which would charge him with such knowledge of the transfer as would naturally lead a diligent person to make inquiry concerning the good faith of the transfer, nor is it suggestive of other facts which would disclose the alleged fraud.

Another material fact respecting plaintiff's laches is the length of time the judgment debtor, *Harrison,* has been in possession and control of the premises. The allegation on this subject is that he was in possession and control on July 17, 1907, when plaintiff states he obtained actual knowledge of the fraud, and that he had so been in possession and control for some time. It must also be considered that plaintiff resided in another state and at such a distance from this property that we cannot presume he observed, or with proper diligence should have observed, whether *Harrison* was so using and treating this property as to suggest that he had an interest in it as owner. What the proof will be under these

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allegations respecting the charge of laches we cannot conjecture. Upon this appeal we cannot go beyond the facts stated in the complaint, and upon them we find no ground for holding that plaintiff has been guilty of such laches that he is precluded in right and justice from prosecuting this action. We must hold that the court erred in sustaining the demurrer to the complaint upon the ground of laches. The facts as stated in the complaint show that plaintiff did not discover the facts constituting the fraud until July, 1907, when the cause of action is deemed to have accrued. Therefore the action is not barred by the statute of limitation.

By the Court.—The order appealed from is reversed, and the cause remanded with the direction that the court enter an order overruling the demurrer to the complaint, and for further proceedings according to law.

LAWTON, Appellant, vs. CITY OF RACINE and others, Respondents.

January 7—January 26, 1909.

Municipal corporations: Public improvements: Preliminary proceedings: Irregularities: Estoppel: Necessity of pleading estoppel.

1. The assessment for street improvements by the front-foot rule, resulting from proceedings commenced under sec. 925—175, Stats. (1898), authorizing a city to cause its streets to be paved upon a vote of two thirds of the members of the common council, the cost of such improvement to be assessed upon the property benefited, a petition purporting to comply with sec. 925—176 having been filed during the proceedings, if not a compliance with the statutes, constitutes an irregular exercise of power merely.
2. A lotowner challenging a completed street improvement must show not only that the power to make the improvement was

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irregularly exercised, but that he is damaged thereby and without fault himself.

3. Where a lotowner, at the time he purchased, knew that his grantor had signed the petition for the paving of the street in front of his premises, and knew that the paving was being done and made no objection until after it was completed, the cost of the improvement being reasonable and the lotowner's premises being benefited to the extent of the assessment against them, he is estopped to maintain an action to enjoin the issuance of bonds to pay for such paving.

4. While estoppel, as a general rule, must be pleaded, if the facts showing the estoppel are within the issues made by the pleadings, and the evidence showing the estoppel is admissible for any purpose thereunder, it is not necessary that the estoppel should be specially pleaded.

APPEAL from a judgment of the municipal court of Racine county: WM. SMIEDING, JR., Judge. *Affirmed.*

This action was brought against the defendant city of *Racine* and its officers to restrain the issue of bonds based upon a special assessment levied for the paving of Center street from Sixth street to De Koven avenue in said city. In the spring of 1906 the common council took action to pave said street and the board of public works was directed by the council to view the street and make estimates as to cost, benefits, and damages which would accrue to each parcel of real estate and the total amount of benefits and damages and report to the common council. The board of public works proceeded accordingly and reported to the council. While this report was before the council and in September, 1906, a petition purporting to be signed by a majority of the owners of the real estate fronting on the street in question was presented to the common council, praying that the street be paved from curb to curb with brick on macadam foundation with sand filler instead of asphalt filler, as formerly ordered by the council. The city, as appears from the record, thereafter proceeded to assess damages according to front-foot rule. The common council by a two-thirds vote directed that the prayer of the petition be granted and the street

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paved with brick on macadam foundation with concrete curb. Thereafter and in June, 1907, the board of public works advertised for bids for the paving of the street, reported the schedule of bids to the common council, and the contract was let for the doing of such work. The work was carried on under the supervision of the board of public works, and assessments made against the adjacent property by the front-foot rule for the paving of the street. A report of this assessment was completed, signed by the members of the board of public works, and filed with the city clerk on the 16th day of November, 1907. Thereupon the common council directed the city clerk to publish a notice, as required by sec. 925—191, Stats. (1898), of the issue of bonds to pay for the paving, which was done. Before the expiration of the thirty days fixed by this notice the appellant brought the present action to restrain the collection of the assessment against his property or the issue of bonds upon it, he being an owner of real estate abutting upon said street. A temporary injunction was granted restraining the defendants from further action. The court found as follows:

First. That one Albert N. Gifford was the owner of the premises described in the complaint at the time when the alleged petition in this matter was signed.

Second. That said Gifford signed such petition for paving in accordance with the requirements of sec. 925—165 of the subchapter in question some time in the month of October, 1906.

Third. That in November, 1906, the plaintiff purchased the premises described in the complaint from said Gifford.

Fourth. That at the time of said purchase the plaintiff knew that said Gifford had signed said petition and subsequently had knowledge of the proceedings to pave said street and that it was actually being paved.

Fifth. That the plaintiff took no steps nor commenced any

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procedure objecting to said proceeding or said work until the said improvement was fully completed.

Sixth. That the paving in question was properly laid in accordance with the request contained in the petition.

Seventh. That the cost of such improvement was reasonable.

Eighth. That the defendant city paid a just and fair proportion of the expense of such paving.

Ninth. That the premises described in the complaint were actually benefited to the extent of $134.69, the amount assessed against said premises as special improvement taxes for the pavement in question.

As conclusions of law the court found:

(1) That the temporary injunction heretofore granted should be dissolved.

(2) That the plaintiff's complaint herein be and the same is hereby dismissed, and that the defendants have judgment for their costs and disbursements.

Judgment was entered in accordance with the findings, from which this appeal was taken.

For the appellant there were briefs by *Fish & Storms,* and oral argument by *I. A. Fish.*

E. R. Burgess, for the respondents.

KERWIN, J. Counsel for appellant contends that the petition presented to the common council was not signed by a majority of the frontage and therefore the council was without jurisdiction to make any assessment. The court below made no finding upon this question, and it is not very clear from the record whether the petition had a majority of the owners or not. Counsel for appellant claims it had not and counsel for respondent that it had, the dispute arising mainly upon ratification and authority of signers who assumed to sign for others. We shall not undertake to decide the question, as we do not regard it necessary to the determi-

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nation of the case. The common council found that a majority had signed and so stated in a resolution passed. It appears from the record that in the spring of 1906 the common council proceeded to pave the street in question under the provisions of sec. 925—175, Stats. (1898), being part of the general charter in force in the city of *Racine*. This section in broad and general terms authorizes the city to cause streets to be paved upon a vote of two thirds of the members of the council where the expense exceeds $500, and further provides that the expense may be paid in whole or in part by the city or by the property to be benefited thereby, as the council shall direct, but in no case shall the amount assessed to any parcel of real estate exceed the benefit accruing thereto by such improvement. Sec. 925—176 provides for improvements of streets upon petition of more than one half of the frontage of the lots upon the part of the street proposed to be improved, and, further, that the cost of such improvement, when made, shall be assessed to the respective owners of the lots fronting upon such street in the ratio of each owner's number of feet front to the entire length of such improvement, exclusive of street crossings, which shall be chargeable to the city as its portion of expense. Sundry proceedings were had by the common council and board of public works regarding the paving of the street in question, resulting in assessing against the respective owners of lots fronting upon the street paved the amount of the assessment according to the front-foot rule.

It is insisted by appellant that the improvement was attempted under sec. 925—176, and that the proof shows that a majority of the owners did not sign, hence the council never got jurisdiction of the subject matter; therefore the assessment was void. The material question to be considered is whether there was a lack of power in the council or an irregular exercise of power. The want of power, as contended by appellant, is based upon lack of a petition signed

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as required by sec. 925—176. But we think the city had power under sec. 925—175, and if it failed to follow the provisions of law it was an irregular exercise of power and not a want of power. We think the authorities upon which appellant relies under this head are mainly, if not wholly, cases where there was a lack of power or where it appeared that the tax or assessment was unjust or inequitable. In *Dietz v. Neenah,* 91 Wis. 422, 64 N. W. 299, 65 N. W. 500, the law under which the assessment was attempted to be sustained was unconstitutional and void. Hence there was no power. In *Jorgenson v. Superior,* 111 Wis. 561, 97 N. W. 565, the city attempted to change the grade of a street without making an assessment of damages, which it had no authority to do. In referring to the question of estoppel urged in the case the court said (111 Wis. 569, 87 N. W. 568):

"When the act done is without jurisdiction or authority, few if any cases recognize or enforce an estoppel. In this case the act of the city was wholly without authority."

Even this case seems to recognize the rule without limitation that one benefited cannot maintain an action to enjoin. The court said:

"So, also, in cases where the adjoining property is being benefited by an improvement of a permanent character, the owner may not sit in silence and accept benefits and then resist payment therefor because of error in the proceedings,"—citing *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. W. 167.

State ex rel. Moore v. Ashland, 88 Wis. 599, 60 N. W. 1001, was a *certiorari* to review the proceeding; hence the rule in equitable actions did not apply. *Canfield v. Smith,* 34 Wis. 381, is where the common council could improve a street at the expense of the adjoining lots only upon petition signed by a certain percentage of the owners of the frontage on the street, and such petition was held essential to give the council jurisdiction, and that equity would grant relief

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where the applicant had not estopped himself in any way from demanding such relief. So, too, in *Dieckmann v. Sheboygan Co.* 89 Wis. 570, 62 N. W. 410, the initial steps were never taken by presentation of a petition or the passage of a resolution, either of which was necessary to give the council jurisdiction of the subject matter. To the same effect is *Borgman v. Antigo,* 120 Wis. 296, 97 N. W. 936.

We therefore think the foregoing cases are distinguishable from the instant case because under the general charter the city had power without any antecedent steps—such as filing of a petition by lotowners—to pave streets, and that the acts complained of, if not in compliance with the charter, constitute an irregular exercise of power merely. Such being the case, it was incumbent upon the plaintiff to show, not only that the power was irregularly exercised, but that he was damaged thereby and without fault himself. *Beaser v. Barber A. P. Co.* 120 Wis. 599, 98 N. W. 525; *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. W. 167; *State ex rel. Hallauer v. Gosnell,* 116 Wis. 606, 93 N. W. 542; *Day v. Pelican,* 94 Wis. 503, 69 N. W. 368; *Hixon v. Oneida Co.* 82 Wis. 515, 531, 52 N. W. 445; *Warden v. Fond du Lac Co.* 14 Wis. 618; *Miltimore v. Rock Co.* 15 Wis. 9; *Mills v. Gleason,* 11 Wis. 470; *Mills v. Charlton,* 29 Wis. 400; *Fifield v. Marinette Co.* 62 Wis. 532, 22 N. W. 705.

The doctrine which controls this case is clearly laid down in *Beaser v. Barber A. P. Co., supra.* The court, speaking through Justice Dodge, said (120 Wis. 601, 98 N. W. 525):

"The judicial policy of this state has now become thoroughly settled that courts of equity will not lend their aid to shield from payment or from the burden of certificates of special assessments for public improvements when the municipality or other governmental representatives had general power to cause such improvements to be made at the expense of the private owner, and the amount assessed is not more than his proper share of the reasonable cost of such improvement; that if, from irregular exercise of that power, or other

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cause, not affecting adversely the burden imposed on him, the imposition be illegal or invalid, he must find his remedy under the strict rules of courts of law. The reason upon which this policy rests is that such a person will not suffer an unlawful burden from the equitable viewpoint, even if he pays what is assessed upon him; hence that courts of equity, although vested with full power, will, in the exercise of their discretion, refuse him their peculiar forms of relief."

True, there is some lack of harmony in the authorities, and it is not always easy to classify them on each side of the line dividing lack of power from irregular exercise of power, but the rule laid down in *Beaser v. Barber A. P. Co., supra,* and other cases in this court, we think is a wholesome one and recognized in the best-considered cases. The findings of the court below which have support in the evidence settle the equities against the plaintiff. The court found that one Gifford, through whom the plaintiff claims, signed the petition for the improvement, and that when plaintiff purchased he had knowledge of the fact and knew that the paving was being done and made no objection until after it was completed, that the cost of the improvement was reasonable, and that the premises owned by the plaintiff were actually benefited to the extent of $134.69, amount assessed against them.

Upon these facts we see no escape from the conclusion that the plaintiff cannot recover. This, we think, is true on the grounds of estoppel if upon no other ground. We see no obstruction to invoking the principles of estoppel. It is said it is not available because not pleaded. True, estoppel, as a general rule, must be pleaded, but there are some exceptions to the general rule. Where the facts showing estoppel are in issue and a part of the case made by the pleadings, and the evidence showing estoppel is admissible for any purpose under the pleadings, estoppel is available as a defense without being specially pleaded. *Bank of Antigo v. Ryan,* 105 Wis. 37, 80 N. W. 440; *Krekeler v. Ritter,* 62 N. Y. 372. Of course it is always the safer and better practice

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to specially plead estoppel where it is relied upon. It follows from what has been said that the judgment below was right and must be affirmed.

By the Court.—The judgment of the court below is affirmed.

BADGER BRASS MANUFACTURING COMPANY, Respondent, vs. DALY and others, Appellants.

January 7—January 26, 1909.

Master and servant: Right of action for interference with contract of employment: Strikes: Injunction: Pleading: Complaint: Discovery: Examination of plaintiff before answer: Limitation of scope: Discretion.

1. While an action to redress the wrongful prevention, by defendants, of a fellow laborer from soliciting work, from engaging in a contract to work, or from continuing in such work should ordinarily be brought by the servant so prevented, yet at the same time a right of action accrues to the master, where the servant is coerced to break an existing contract with the master, or where abuse and violence backed by conspiracy amounts to an actionable interference with the employer's rights.
2. In an action by a master to enjoin the wrongful prevention of his servants from carrying out their contracts of employment, the complaint should be detailed, certain, and specific, giving facts and circumstances, including time and place of each alleged act of coercion, the name of the person coerced, if known, the manner in which he was coerced, and the manner in which and the extent to which it affected or impeded the master's right to conduct his business in a lawful way.
3. In proceedings under sec. 4096, Stats. (1898), for the examination of a party before issue joined, the court is not concluded by the required affidavit as to what is necessary to enable the moving party to plead.
4. In proceedings under sec. 4096, Stats. (1898), taken before issue joined, the limiting of the examination so as to prevent any examination under any or either of the points set forth in the required affidavit, stated in the opinion, is *held* to show no abuse of discretion.

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APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The appeal is from an order limiting the examination before pleading of the plaintiff's officers at the instance of the defendants under sec. 4096, Stats. (1898), as amended.

For the appellants there was a brief by *John C. Slater*, attorney, and *Rubin & Zabel*, of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Slater.*

Among other references upon the part of the appellants were the following: *Walker v. Backus H. Co.* 97 Wis. 160, 72 N. W. 230; *Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436, 78 N. W. 1096; *Chain B. Co. v. Von Spreckelsen,* 117 Wis. 106, 94 N. W. 78; *Milwaukee v. Gimbel Bros.* 130 Wis. 31, 110 N. W. 7; *State v. Baetz,* 86 Wis. 29, 56 N. W. 329; *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 66 N. W. 695; *Ellinger v. Equitable L. A. Soc.* 125 Wis. 643, 104 N. W. 811.

For the respondent there was a brief by *Cavanagh & Barnes,* and oral argument by *C. D. Barnes.*

Among other references upon the part of the respondent were the following: *Cleveland v. Burnham,* 60 Wis. 16, 17 N. W. 126, 18 N. W. 190; *Tiede v. Schneidt,* 99 Wis. 201, 74 N. W. 798; *Schœffler v. Schwarting,* 17 Wis. 30; *Starks v. Redfield,* 52 Wis. 349, 9 N. W. 168; *Quayle v. Bayfield Co.* 114 Wis. 108, 89 N. W. 892; *Hawarden v. Youghiogheny & L. C. Co.* 111 Wis. 545, 87 N. W. 472.

TIMLIN, J. The complaint in this action averred the corporate character of the plaintiff, the nature of its business, its ownership and possession of real estate constituting its factory plant, and the value thereof, and the number of men employed by it when running at its full capacity. It then averred the existence of a voluntary association called the Metal Polishers, Buffers, Platers, Brass Moulders, Brass and Silver Workers' Union of North America, composed of

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many thousand members of workmen in the lines indicated and operating through a central organization and district and subordinate organizations called lodges, some of the latter being in the city of Kenosha, where the plaintiff's plant was located, and that the membership of such association was so numerous as to make it impracticable to cause all members to be parties to this action. Some of the defendants were formerly employed by the plaintiff, but were not so employed at the commencement of the action. It is then averred:

"That all of the defendants named in the title of this complaint have conspired, combined, and confederated together and with each other, and with many hundred other persons who are unknown to this plaintiff, to maliciously injure this plaintiff, and to cripple, injure, and destroy its said business, and that all of the members of the said Metal Polishers, etc., Union of North America have combined, conspired, and confederated together and with many other persons unknown to this plaintiff, through the machinery of the said association and its said locals, and otherwise, to injure, cripple, impede, and obstruct the business of this plaintiff, for the purpose of maliciously compelling this plaintiff to do and perform many acts against its will, as hereinafter more particularly set out, and to maliciously prevent and hinder this plaintiff from doing and performing lawful acts—that is to say, operating its factory according to the wish and judgment of this plaintiff and its officers in a lawful way; that the said defendants have so conspired, confederated, and combined, and are now conspiring and undertaking and concerting together, and with many other persons within and without said city, through said association, its said local and otherwise: (a) to compel this plaintiff against its will and their will, to pay, etc., (b) to compel this plaintiff, etc., (c) to prevent this plaintiff, etc., (d) to prevent this plaintiff, etc., (e) to prevent this plaintiff, etc., (f) to prevent this plaintiff, etc., (g) to drive away by intimidation and threats such of the workmen of this plaintiff as are susceptible of intimidation and to entice away others, and to induce, by intimidation or other improper and unlawful methods, customers of this plaintiff to abandon

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this plaintiff and place their trade elsewhere, (h) to persuade, etc."

The allegations of conspiracy for each of the separate purposes aforesaid are reiterated, and the pleader proceeds:

"And this plaintiff shows that, in furtherance of the said conspiracy, the said defendants have stationed and now keep upon the streets and places in front of and adjoining and adjacent to the said factory of this plaintiff many of their number, who are called by the said defendants 'pickets,' and keep said pickets to the varying number of from three to forty constantly during the day upon the said streets in the said locality, and in view of the entrance of the said premises of this plaintiff, and at the railroad depots and electric car station and stopping places in said city of Kenosha, and cause the said pickets constantly to loiter about the premises of this plaintiff and patrol the streets in front of and about said premises and about said depot, stations, and stopping places, in squads and crowds, and to threaten violence to workmen employed or seeking employment in the said plant of this plaintiff, or coming thereto in search of such employment; that the said pickets are constantly about and in the neighborhood of the said premises, and that every time that any workman leaves or approaches the said premises, or that any workman endeavors to approach said premises, or comes thereto for the purpose of seeking employment from this plaintiff, said pickets, by the use of violence, threats of violence, intimidation and abusive language, attempt, and endeavor to seduce or drive away said workmen and applicants from such employment, and stop such workmen and by physical force compel them to listen to the arguments and persuasions or threats and slanderous words of said pickets. . . . The plaintiff further alleges that the said defendants, by themselves and their co-conspirators, have on several occasions assaulted, beaten, bruised, and otherwise maltreated the employees of this plaintiff, and more especially on the 21st day of November, 1907, in furtherance of said conspiracy and for the purpose of preventing said employees from remaining in the employment of this plaintiff, and for the purpose of carrying out the said conspiracy and for the purpose of preventing this plaintiff from operating its said factory and business."

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It is then averred that defendants, by themselves and through said pickets who are members of the said association, have on many occasions driven away men from the employment of the plaintiff, and that they are constantly by the use of violence and intimidation driving off such workmen, and that they give out and threaten that they will continue this course of action and will continue to boycott this plaintiff and its employees and operatives, and will, by use of the means aforesaid, prevent plaintiff from securing or retaining workmen and from securing or performing contracts in and about its business, and will so destroy the trade of the plaintiff and force the abandonment of its factory unless the plaintiff shall against its will do or refrain from the acts mentioned as the objects and purposes of the conspiracy. Then follows a substantial repetition characterizing the acts of the defendants as a nuisance in and obstructions to the highways adjacent to plaintiff's property, and that each of the defendants is a man of small means and unable to respond in damages to the plaintiff. A perpetual injunction is prayed for; also an injunction *pendente lite.*

The remarkable thing about this complaint is the generality of its averments—the lack of dates, instances, facts, or circumstances. It is made up almost wholly of conclusions of the pleader. The nearest approach to fixing time is that averment that the defendants and their co-conspirators on several occasions assaulted, beat, and otherwise maltreated employees of the plaintiff and more especially on the 21st day of November, 1907. There is nothing to show the relation of the beaten and maltreated employees to the plaintiff except the mere statement that they were employees.

When one laboring man is prevented from soliciting work, engaging in a contract to work, or continuing in his work by one or more of his fellow laborers, the more direct wrong is that done to the laboring man so coerced, and he ordinarily should bring the action to redress that wrong. At the same

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time a right of action of a different nature sometimes accrues to the employer of such person, as where the workman so coerced is in this manner induced to break his existing contract with such employer, or in cases where the interference with workmen not yet under contract with the employer, but seeking employment, becomes so greatly attended with abuse and violence and backed by a conspiracy and the aid of numbers as to amount to an actionable interference with the right of the employer to carry on his lawful business. In such contests between employers and workmen there is frequent recourse to much strategy, and the law does not uphold that strategy on the part of the employer by which he seeks to obtain a blanket injunction upon a blanket complaint abounding in general conclusions but lacking in facts and circumstances; nor that strategy upon the part of employees by which, under pretense of peaceful picketing and disclaimer of responsibility for assaults and outrages which they have committed, countenanced, or encouraged, they seek to unlawfully interfere with the employer's right to conduct his own business in a proper manner. A complaint in an action for an injunction by the employer in such case should be detailed, certain, and specific, giving facts and circumstances, including time and place of each alleged act of coercion, the name of the person coerced, if known, the manner in which he was coerced, and the manner in which and the extent to which it affected or impeded the employer's right to conduct his business in a lawful way. No preliminary injunction should have been granted upon the complaint in this case.

In the case at bar, instead of demanding a bill of particulars or moving to vacate the temporary injunction or moving to make the complaint more definite and certain, or joining issue and then examining the officers of the plaintiff, the defendants by one of their number presented an affidavit under sec. 4096, Stats. (1898), as amended, alleging that dis-

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covery was necessary in order to enable them to answer the plaintiff's complaint, and, averring sixty-four points upon which discovery was considered necessary, attempted to examine the officers of the plaintiff under the statute otherwise than as witnesses upon the trial. This was met by a notice of motion to limit the scope of the examination, and upon hearing of this motion the circuit court made the order appealed from, so limiting the examination as to prevent any examination upon any or either of the sixty-four points set forth in the affidavit. We cannot, without extending this opinion to an inordinate length, consider each of these sixty-four points separately. The statute in question provides:

"If such examination shall be taken before issue joined the notice of taking the same shall be accompanied by an affidavit of the party, his agent or attorney stating the general nature and object of the action, that discovery is sought to enable the party to plead and the points upon which such discovery is desired, and such examination shall be limited to the discovery of the facts relevant to such points unless the court or the presiding judge thereof, on motion and one day's notice, shall, before the examination is begun, by order further limit the subjects to which it shall extend." Sec. 4096, Stats. (1898), as amended by ch. 29, Laws of 1899, and ch. 244, Laws of 1901.

"The only pleading on the part of the defendant is either a demurrer or an answer." Sec. 2648, Stats. (1898). The answer may contain a counterclaim (sec. 2655, Stats. 1898), but no showing of the existence of a counterclaim is made. Obviously under this statute a defendant cannot by mere affidavit conclude the court as to what is necessary to enable him to answer, but that must be determined from the averments of the complaint together with the explanations or new matter set forth in the affidavit. It must appear that the points upon which discovery is desired are necessary to enable the party to answer, and, that appearing, the examination must be limited to the discovery of facts relevant to

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such points; but even then the court or the presiding judge thereof may by order still further limit the subjects to which the examination shall extend. This must give the circuit court an authority over such examinations before issue joined, largely discretionary, and his order should not be reversed unless there is a clear abuse of discretion. The defendants proposed to inquire whether the plaintiff was a corporation, whether it had authority to engage in its present business, whether it was the owner and in possession of its plant, whether the plant was of great value, what was its output, the number of men employed when running at full capacity, whether the plaintiff was at the time of commencing the action running with less than its full complement of hands or endeavoring to engage and employ workmen. It is obvious that none of these was necessary to enable the defendants to answer. The defendants proposed to inquire further what knowledge or information the plaintiff had on the following subjects: That it is prevented by the conspiracy of the defendants from securing men; that the defendants are members of unions; that the defendants unlawfully conspired, etc.; that its business would be injured, etc. All inquiries directed to what knowledge or information the plaintiff had were obviously unnecessary to enable the defendants to answer.

Other points upon which the examination of the plaintiff was desired related to the manner in which the defendants performed the acts charged and did the things charged against them in the complaint. All these were obviously unnecessary for the purpose stated. Another series of points upon which examination was desired related to whether or not the defendants had stationed and kept on the streets in front of and adjoining the plaintiff's factory some of their number, whether or not they were called pickets, whether or not said pickets were constantly upon the streets, whether or not said pickets collected in crowds and threatened violence

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and used abusive language, etc. All these matters were obviously within the knowledge of the defendants, and examination on these and similar subjects was not necessary to enable the defendants to answer.

Other points upon which discovery was sought for the purpose aforesaid were whether or not the allegations in paragraph 5 of the complaint are not maliciously false and untrue, and whether or not the said allegations were made pursuant to a conspiracy on the part of the plaintiff and members of an employers' association to endanger the said defendants. Examination on such last-mentioned subjects and on some of the subjects hereinbefore noticed would be proper after issue joined, but we are not convinced that such examination was necessary in order to enable these defendants to answer the complaint, nor that the circuit court abused its discretion in so ruling. It seems to us that the defendants have mistaken their remedy and that the order appealed from should be affirmed.

By the Court.—The order of the circuit court is affirmed.

MURPHY, by guardian *ad litem,* Respondent, vs. THE HEROLD COMPANY, Appellant.

January 9—January 26, 1909.

Trial: Reception of evidence: Discretion of trial court: Municipal corporations: Streets: Hatchways: Notice: Injury to pedestrians: Contributory negligence: Landlord and tenant: Dangerous premises: Liability of lessee: Special verdict.

1. It is within the discretion of the trial court to permit a plaintiff, who has rested, to introduce further evidence.
2. A pedestrian, who knew of the existence of a hatchway and that it was sometimes open, is not necessarily guilty of contributory negligence as matter of law for failing to look and discover that it was open before he walked into it.

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3. A pedestrian has the right to presume that a known hatchway, if open, will be properly guarded, and is not chargeable with knowledge that it is in fact open, in the absence of notice of such condition.
4. The lessee of a building, to whom a drayman was delivering merchandise through a hatchway which he left open and unguarded, is liable to a pedestrian who falls through the hatchway for the negligence of the drayman, in the absence of evidence that the drayman was acting independently of the control of the lessee.
5. A special verdict which submits all the essential facts is not erroneous because it fails to submit one issue by a separate question.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff, an infant, through his guardian *ad litem,* to recover for personal injuries sustained on the 16th day of January, 1905, by falling through an open hatchway in front of the southerly part of a building known as the Herold Building, on Broadway, a public highway in the city of Milwaukee. The negligence charged is that the defendant failed to properly guard the hatchway and negligently permitted the same to be left open, to the plaintiff's injury. The defendant denied negligence and alleged contributory negligence on the part of the plaintiff, and further claimed that, if there was any negligence, such was not that of defendant, but of one August Tews, who was an independent contractor. The jury returned the following verdict:

"(1) Was the plaintiff on the evening of January 16, 1905, injured by falling through an open hatchway in the sidewalk of the premises known as the Herold Building? *A.* (by direction of the court). Yes.

"(2) Were the defendants exclusive of the defendant *Herold Company* negligent in failing to provide the doors of the hatchway with devices to keep them from falling down on the sidewalk when opened? *A.* No.

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"(3) Was the hatchway at the time in question so negligently guarded as to make the sidewalk not reasonably safe for travel thereon by pedestrians themselves using ordinary care? *A.* Yes.

"(4) If you answer the second and third questions or either of them 'Yes,' then answer this question: Was such negligence the proximate cause of plaintiff's injury? *A.* Yes.

"(5) Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? *A.* No.

"(6) If the court should be of the opinion that the plaintiff is entitled to recover, what sum would reasonably compensate him for his injury? *A.* $2,000."

After denial of the usual motions, judgment was rendered upon the verdict in favor of the plaintiff, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Doe & Ballhorn.*

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

KERWIN, J. The defendant had a lease of part of the Herold Building, so called, situate on the southwest corner at the intersection of Broadway and Mason streets, in Milwaukee, and at the time of the injury was using such premises for the publication of a newspaper. Along the entire Broadway side and close to the building and as part of the sidewalk was a continuous elevation about five feet wide and about three and three-fourths inches higher than the balance of the sidewalk. At the south end of this elevation was a hatchway running close to the east wall of the building and extending easterly about four feet eight inches. The hatchway or doors used for closing it were about four feet wide and consisted of two doors of open iron grating fastened in an iron frame, each door being about four and one-half feet long and two feet wide. When these doors were open they laid back flat on the sidewalk unless propped up. The

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hatchway and premises in question are exhibited by the plat attached to the bill of exceptions, also by photographs attached to appellant's brief. The hatchway doors opened to the north and south, respectively, upon iron hinges. Under the hatchway is an excavation from which there is an opening into the building to allow supplies for the use of the defendant to be delivered through the hatchway into the basement. From the doors of the hatchway to the floor or ground below is seven and one-half feet.

One August Tews was employed by the appellant to deliver print paper used by it in its business at a certain price per ton. He delivered it upon a wagon or dray and conveyed it from the wagon across the sidewalk to the hatchway upon a skid. At the time of the injury Tews was delivering paper to the appellant, and when the accident happened he was in the basement unloading paper from the elevator.

The plaintiff testified that he saw no wagon or skid, and that the hatchway doors were open and laid flat upon the sidewalk; that he did not see the open hatchway until he fell into it. The plaintiff lived with his mother in Milwaukee, had attended public school for about eight years, and for three months before the accident was employed as errand boy by a Milwaukee company whose place of business was in the block north of the Herold Building. At the time of the injury and about 6 o'clock in the evening plaintiff was walking upon the elevated portion of the sidewalk, hurrying home as he was doing his last errand, and his attention was somewhat attracted by a man and woman south of the Herold Building about 100 feet from him. He testified that he was looking straight ahead and did not notice that the hatchway was open; that he never saw Tews unloading paper in the evening after it was dark, but saw him do so two or three times a week, mostly about 9 o'clock in the morning, and never saw the hatchway open when no one was there; that there was no one outside guarding or attending it at the

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time of the accident and there was no danger sign; that he saw no wagon or skid there.

1. Defendant moved for a nonsuit and directed verdict, both of which motions were denied, and defendant complains of this ruling. After plaintiff rested, the court permitted him to introduce further evidence. This was clearly within the discretion of the court and no error was committed in that regard. It is insisted upon the part of the appellant that on the undisputed evidence plaintiff was guilty of contributory negligence as a matter of law and that the court should have nonsuited him, and, refusing to do so, should have directed a verdict at the close of all the evidence. This contention is based mainly upon the fact that plaintiff knew of the hatchway and that at times it was open, and, in failing to look and discover that it was open before he walked into it, was guilty of contributory negligence as a matter of law, and relies upon the following cases in support of this contention: *Bohn v. Racine,* 119 Wis. 341, 96 N. W. 813; *Sweet v. Ohio C. Co.* 78 Wis. 127, 47 N. W. 182; *Hausmann v. Madison,* 85 Wis. 187, 55 N. W. 167; *Hoye v. C. & N. W. R. Co.* 62 Wis. 666, 23 N. W. 14; *Lyon v. Grand Rapids,* 121 Wis. 609, 99 N. W. 311; *Achtenhagen v. Watertown,* 18 Wis. 331; *Nicks v. Marshall,* 24 Wis. 139.

In *Nicks v. Marshall, supra,* the contributory negligence consisted mainly in knowledge of the defect in the highway and assuming a dangerous position upon an unbound load of hay, in consequence of which plaintiff was thrown therefrom and injured. In *Hausmann v. Madison, supra,* the injury was caused by slipping upon an icy sidewalk, which slippery condition was known to plaintiff, and caused by melting snow and ice which had dripped from an adjacent building and formed an uneven and slanting icy condition of the sidewalk. In *Sweet v. Ohio C. Co., supra,* the injury was caused by an improperly constructed stairway used by the employees on a coal dock, which was steep, without railing, and had steps at

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irregular distances, which defects were obvious, and it was held that an employee who had been at work on the dock and who had used the stairway was chargeable with knowledge of such defects and assumed the risk. In *Hoye v. C. & N. W. R. Co., supra,* the court held that, unless the inference of negligence or its absence is necessarily deducible from the undisputed facts and circumstances proved, the question is one for the jury, and it was held that the question of contributory negligence of the plaintiff's intestate was one for the jury. In *Bohn v. Racine, supra,* the jury found that the plaintiff was guilty of contributory negligence and the court below refused to disturb the finding of the jury and this court declined to disturb the finding below. The injury occurred in consequence of a partially constructed cement sidewalk with which plaintiff was familiar. In *Lyon v. Grand Rapids, supra,* the plaintiff knew of the hole in the sidewalk into which she stepped, and this court held that, having knowledge of the defective condition, she must show some excuse for having forgotten it. It appears from the evidence that plaintiff was carrying several things which somewhat occupied her attention, and when near the hole her husband, who was a short distance ahead, called to her to hurry, that this drew her attention to him, and almost instantly thereafter she stepped into the hole. It was held that these facts were sufficient to warrant the jury in finding that the plaintiff was excused for not remembering the defect. In *Achtenhagen v. Watertown, supra,* erroneously cited by appellant as 118 Wis. 331, instead of 18 Wis. 331, it is held that the plaintiff is not bound in the first instance to show that he was not guilty of negligence which contributed to the injury, but is bound only to establish a *prima facie* case and that the injury was occasioned by the negligence of the defendant; but, if the plaintiff's own evidence raises an inference of negligence against himself, he must in order to establish a *prima facie* case show that he was not guilty of negligence.

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The case, like many others which may be found, was one where the plaintiff knew of the danger and was familiar with it, which was a hole in a bridge over which he was passing in the daytime, and over which he had passed but a short time before on the same day.

It will be seen from an examination of the cases referred to that they are not controlling against the plaintiff here. There is considerable difference between the class of cases cited to our attention by counsel for appellant, where the plaintiff had knowledge of the actual existence of the defect, and a case like the one before us, where there would be no defect if the hatchway had been closed or properly guarded when open. While it is true in this case plaintiff had seen Tews delivering paper, he testified that at such times the open hatchway was guarded by the presence of some one in charge of it or by the doors being propped up. Besides, he testified that he never saw Tews or any one else delivering supplies after dark. He had a right to presume that the hatchway would be properly guarded when open, and was not chargeable with knowledge of a defect of which he had no notice. *Prideaux v. Mineral Point,* 43 Wis. 513, 524; *Dorsey v. Phillips & C. C. Co.* 42 Wis. 583; *Whitty v. Oshkosh,* 106 Wis. 87, 81 N. W. 992. While the question of the plaintiff's contributory negligence in this case is rather close under the authorities, we think it is distinguishable from the cases relied upon by appellant. We do not think it can be said as matter of law upon the evidence produced that the plaintiff was bound to bear in mind that the hatchway was liable to be left open and unguarded, or that his attention was not so diverted as to excuse him from not observing the opening before he walked into it. *Crites v. New Richmond,* 98 Wis. 55, 73 N. W. 322; *Wheeler v. Westport,* 30 Wis. 392; *Cuthbert v. Appleton,* 24 Wis. 383; *Wolf v. C. & N. W. R. Co.* 131 Wis. 335, 111 N. W. 514; *Cumisky v. Kenosha,* 87 Wis. 286, 58 N. W. 395; *Petrich v. Union,* 117

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Wis. 46, 93 N. W. 819. Some deference is due the judgment of the court below upon its finding that there was sufficient evidence to go to the jury upon the question of contributory negligence of plaintiff, and we do not feel warranted in disturbing its finding in that regard.

2. It is further insisted by counsel for appellant that, conceding Tews was negligent in leaving the hatchway open and unguarded, still appellant is not liable for such negligence because Tews was an independent contractor. It appears that Tews had a contract with appellant to deliver paper to it at an agreed price per ton. It is established, however, that the appellant had control and possession of the premises and received the paper delivered by Tews through this hatchway and upon an elevator which conveyed it into the basement of the building. So far as the evidence shows, the possession and control of the building and premises, including the hatchway through which the paper was delivered, remained with appellant. Under such circumstances we think the negligence of Tews in managing the hatchway in such manner as to leave it open and unguarded so as to be dangerous was the negligence of the appellant. The evidence does not show that he was not under the control of the appellant in the prosecution of his work in delivering paper into the building occupied by the appellant. The means and methods of doing the work appear from the evidence to have been to some extent at least under the supervision of the appellant. Under such circumstances the appellant is liable for the negligence. We have carefully examined the cases cited by appellant on the subject under consideration and think they are clearly distinguishable from the one now before us. Without taking time to discuss them in detail, they mainly belong to the class of cases where in the performance of the work the contractor is subject to no control or supervision by the person for whom the work is being done, but is only answerable for results; the manner, means, and appliances for the execution

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of the work being left solely to the contractor. The case of *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041, is a fair example of the rule of this class of cases. Without further pursuing this question, we are convinced that the appellant is liable for the negligence which caused the injury. *O'Neill v. Blase,* 94 Mo. App. 648, 68 S. W. 764; *Waters v. Pioneer F. Co.* 52 Minn. 474, 55 N. W. 52; *Holmes v. Tennessee C., I. & R. Co.* 49 La. Ann. 1465, 22 South. 403; *Sadler v. Henlock,* 4 El. & Bl. 570; *Cincinnati v. Stone,* 5 Ohio St. 38. It is also argued by respondent that the appellant is liable for the negligence of Tews even if he was an independent contractor; but we do not find it necessary to pass upon this question.

3. Objection is made to the form of the verdict, and it is insisted that the court erred in refusing to divide the third question or to add another question by which the negligence of the appellant would have been submitted to the jury as a separate question. We think the verdict submitted presented the issuable facts to the jury and that no error was committed in refusing to submit another question or divide the third question as requested by the appellant. We find no reversible error in the record; therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

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SCHUMACHER, Appellant, vs. DRAEGER and others, Respondents.

January 9—January 26, 1909.

Appeal and error: Review: Equity: Admission of evidence: Deeds: Action to set aside: Burden of proof: Descent and distribution: Rights of expectant heirs: Delivery of deed: Evidence: Findings: Trusts and trustees: Creation: Declaration of trust: Sufficiency: Effect.

1. **In an action in equity error cannot be assigned on the admission, or on the refusal to strike out, evidence, if there is sufficient other evidence to support the judgment.**
2. **In an action to set aside a deed for fraud or undue influence the burden of proof is upon the plaintiff.**
3. **The owner of real estate, as against the heir, may convey it to another as a gift without consideration.**
4. **Evidence that a deed, signed by the grantor on the day of her death, accompanied by directions to her husband to deliver it to the grantee, followed by a manual delivery after the grantor's death, upholds findings that the deed was in fact delivered.**
5. **A deed of land, absolute in form, to which is annexed a parol trust, void by the provisions of secs. 2302, 2304, Stats. (1898), is not absolutely void, nor voidable at the suit of the heir of the grantor, if the trustee observes the terms and executes the trust itself or executes a written declaration of trust.**
6. **An answer, verified and filed by the grantee in a deed, in a suit by the heir of the grantor to set the deed aside, admitting the terms and offering to execute a parol trust, is a sufficient written declaration of trust binding upon the grantee and available to the beneficiaries.**
7. **A conveyance to a trustee to the use of A. for life and thereafter to B., imposing no active duties upon the trustee, is within the calls of sec. 2073, Stats. (1898), and vests an absolute legal estate in A. for life, with remainder to B.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The appeal is from a judgment given in a suit in equity.

For the appellant there was a brief by *W. A. Hayes* and *Chas. G. Woolcock,* and oral argument by *Mr. Woolcock.*

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Among other references upon the part of the appellant were the following: Secs. 2302, 2304, Stats. (1898); *Krouskop v. Krouskop,* 95 Wis. 296, 70 N. W. 475; *Fairchild v. Rasdall,* 9 Wis. 379; *Duncan v. Duncan,* 111 Wis. 75, 86 N. W. 562; *Bird v. Morrison,* 12 Wis. 138; *Smith v. Putnam,* 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288; *Scheuer v. Cochem,* 126 Wis. 209, 105 N. W. 573; *Kaufer v. Stumpf,* 129 Wis. 476, 109 N. W. 561; sec. 2180, Stats. (1898); *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056.

C. H. Van Alstine, guardian *ad litem,* for the respondent *Oettinger.*

For the other respondents there was a brief by *Houghton & Neelen,* and oral argument by *F. W. Houghton.*

Among other references upon the part of the respondents were the following: *Begole v. Hazzard,* 81 Wis. 274, 51 N. W. 325; *Whiting v. Gould,* 2 Wis. 552; secs. 2071, 2073, 2075, Stats. (1898); *Tyson v. Tyson,* 96 Wis. 59, 71 N. W. 94; *Loring v. Palmer,* 118 U. S. 321, 6 Sup. Ct. 1073; *Tyson v. Richardson,* 103 Wis. 397, 79 N. W. 439; *Schreyer v. Scott,* 134 U. S. 405, 10 Sup. Ct. 579; *Hart v. Hart,* 117 Wis. 639, 94 N. W. 890.

TIMLIN, J. Louisa Meister died intestate at Milwaukee, Wisconsin, November 4, 1905, and left her surviving her husband, *August Meister,* and the plaintiff, her daughter by a former marriage. The plaintiff had one child, who is the infant defendant *Eugene Oettinger.* On the day of her death Louisa Meister conveyed her property, consisting of a house and lot, by absolute deed to the defendant *Henrietta Draeger.* The deed was afterwards recorded. The plaintiff, as heir at law, brought this action to set aside the deed, averring lack of capacity and undue influence and entire absence of consideration for the conveyance. The defendant *Henrietta Draeger* answered, admitting the execution of the deed and some other matters, but interposing a general denial against

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the averment of incapacity and undue influence, and then pleaded affirmatively as follows:

"And said defendant alleges that several weeks prior to the death of the said Louisa Meister she informed the defendant that prior to her death she should make and execute a deed of her real estate and homestead to this defendant, and that she wished this defendant to accept such deed and hold such real estate in trust for her during the life of *August Meister,* one of the defendants in this action, and after the decease of the said *August Meister* to make a deed of such real estate to her grandson, *Eugene Oettinger,* the son of said plaintiff, and that she wished this defendant to allow her husband, *August Meister,* one of the defendants in this action, after the decease of said Louisa Meister, to have the use and occupation of said premises during his life, and that upon his decease this defendant should then convey said real estate to the said *Eugene Oettinger,* the son of the plaintiff in this action; that this defendant then and there advised said Louisa Meister that it would be better for her to make a will, but that if she made the deed to her in the way she had suggested she would hold such property in trust for the use and benefit of *August Meister,* her husband, during his life, and after his death would convey the same to her said grandson, *Eugene Oettinger.* And this defendant now comes into court and admits of record that she holds the title of such real estate subject to such agreement, which she here offers and is willing to carry out, either at the time of the decease of said *August Meister,* or convey such property at the present time to the said *Eugene Oettinger,* son of said plaintiff, and grandson of said Louisa Meister, deceased, with a life lease to the said defendant *August Meister.*"

The defendant *August Meister* answered, and the infant *Eugene Oettinger,* by his guardian *ad litem,* submitted his rights and interests in the matters in question to the care and protection of the court. Evidence showed that the deceased was about seventy years of age, illiterate, and in ill health; that *Henrietta Draeger* was a widow about fifty-seven years of age, crippled with rheumatism, generally confined to her house by this sickness, to a considerable degree

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incapable mentally of understanding or transacting business or testifying intelligently, but that she was a friend of Louisa Meister, and had, prior to the execution of the deed, promised Louisa Meister substantially as averred in the answer above quoted. It was also made to appear that immediately after the execution of the deed Louisa Meister directed her husband to take it over and give it to *Mrs. Draeger,* but he delayed doing so until after the death of Louisa Meister. The plaintiff, *Augusta Schumacher,* married her present husband on or about November 23, 1905.

These facts were found by the circuit court, and also that the plaintiff was addicted to strong drink, by reason of which there existed, at the time of the death of Louisa Meister, an estrangement between her and the plaintiff, and that the deed was made as indicated in the answer of *Henrietta Draeger,* and that there was no fraud or undue influence practiced upon said Louisa Meister. And as conclusions of law, that certain defendants were entitled to judgment dismissing the complaint as to them, and that the defendants *Henrietta Draeger, August Meister,* and *Eugene Oettinger* by C. H. Van Alstine, his guardian *ad litem,* were entitled to judgment dismissing the complaint without costs and to a decree declaring that the deed of conveyance of Louisa Meister above mentioned was a trust deed, and that the said *Henrietta Draeger* is the trustee under such deed and holds the title of the real estate in question as such trustee for the use and benefit of *August Meister* during his life, and after his death for the use and benefit of *Eugene Oettinger* and his heirs forever, and that within thirty days of the date of the entry of such decree the said *Draeger* should make and execute a good and sufficient deed of conveyance to the said *August Meister* of a life estate in said real estate, with remainder over to *Eugene Oettinger* and to his heirs forever, and that in case of the failure, for any cause whatsoever, of the said *Henrietta Draeger* to execute such deed within said

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thirty days, the title of the said real estate be divested from *Henrietta Draeger* and vested in *August Meister* for life, with remainder over to *Eugene Oettinger* and his heirs forever. The real estate in question was properly described in said decree.

Error is assigned (1) in denying plaintiff's motion for judgment on the pleadings; (2) in the admission of incompetent testimony; (3) in denying plaintiff's motion to strike out incompetent testimony; (4) in denying plaintiff's motion to amend the complaint to conform to the proof by alleging that there was no delivery of the deed in question; and (5) in the findings of fact, conclusions of law, and judgment thereon. This being a suit in equity, error cannot be assigned upon the admission of, or the refusal to strike out, evidence so long as there is other evidence to support the judgment.

The findings of the circuit court to the effect that there was neither fraud nor undue influence practiced upon Louisa Meister are well supported. The burden of proof to establish these averments rested upon the plaintiff and the plaintiff produced no evidence to support these charges. Under such circumstances, the real estate in question belonging to Louisa Meister, she might, as against the plaintiff, her heir at law, convey it by deed to *Henrietta Draeger* or to any other person as a gift without consideration. *Croft v. Bunster,* 9 Wis. 503; *Carey v. Dyer,* 97 Wis. 554, 73 N. W. 29; *Warder v. Baker,* 54 Wis. 49, 11 N. W. 342; *Kuener v. Smith,* 108 Wis. 549, 84 N. W. 850; 13 Cyc. 529, 530. This closed out the plaintiff's right to attack the conveyance of her mother, unless the conveyance did not go into effect for want of delivery or was void because of the parol trust in pursuance of which the deed was executed. The plaintiff's motion for judgment on the pleadings seems to indicate some such belief on her part. No question is made and no argument presented with respect to the validity of this deed as a

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testamentary disposition of property under secs. 2227 and 2228, Stats. (1898).

On the question of delivery *August Meister* testified:

"At the time this deed was drawn my wife said that the deed would have to be taken to the register of deeds. Nothing else was said that I know of. . . . After the deed was signed it remained right there in the house, because she died shortly after, and it remained there. It may have remained there a day or so, and then it was sent to *Mrs. Draeger's.* I took it over because I was told to—my wife and *Mr. Grootemaat* told me to. My wife told me that different times before, and at the same time the deed was made. I saw my wife put her mark upon the deed. It remained on the table where she signed it. She died, and the deed remained on the table, and after that I possibly took it myself off the table; I don't remember that. I saw the witness sign the deed."

Mr. Grootemaat testified:

"I gave her the deed, and I think she turned it over to her husband, and told him to deliver it the next day to this lady friend of hers. 'Take it over there and have her take charge of it.' I remember that was the conversation."

The testimony of *Henrietta Draeger* was very confused and unsatisfactory, and she did not appear to know who delivered the deed to her. But the deed was executed on November 4th, and recorded on November 6th at 8:30 a. m., and on this evidence the court below found that *August Meister* did, on or about the 6th day of November, 1905, deliver this deed to *Henrietta Draeger,* and that Louisa Meister in her lifetime delivered this deed to *August Meister,* and directed him to deliver this deed to *Henrietta Draeger* at once after the death of Louisa Meister. The case is rather close on the question of delivery, but there seems to be sufficient to bring it within the rule of *Wells v. Wells,* 132 Wis. 73, 111 N. W. 1111, and sufficient evidence to uphold the finding of the circuit court that the deed was in fact delivered.

Appellant cites secs. 2302 and 2304, Stats. (1898), for the

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purpose of showing that the trust agreement was void because not in writing, deducing from that proposition that there was no consideration for the deed and hence that the deed was invalid. We cannot assent to the last conclusion. The parol trust attempted to be annexed by Louisa Meister and *Henrietta Draeger* to the absolute deed of conveyance in question was probably void and unenforceable in its inception and at the time of the commencement of this action, but that did not render the deed absolutely void, nor voidable at the suit of an heir at law of the grantor, who had no other interest in the land and was not a beneficiary under the invalid trust, because, notwithstanding the trust was not evidenced in writing as required by law, the trustee, *Draeger,* might observe its terms and execute the trust itself or execute a declaration of trust in writing thereafter. *Karr v. Washburn,* 56 Wis. 303, 14 N. W. 189. When *Mrs. Draeger* verified and filed her answer containing the paragraph quoted in this opinion she executed in writing a declaration of trust binding upon her and available to the beneficiaries of that trust. *Main v. Bosworth,* 77 Wis. 660, 46 N. W. 1043; *Lynch v. Ryan,* 132 Wis. 271, 111 N. W. 707, 112 N. W. 427; 3 Pom. Eq. Jur. (3d ed.) § 1007; *Patton v. Chamberlain,* 44 Mich. 5, 5 N. W. 1037; *Robbins v. Butler,* 24 Ill. 387; *White v. Ross,* 160 Ill. 56, 69, 43 N. E. 336; 28 Am. & Eng. Ency. of Law (2d ed.) 877, and cases cited in note 2. The trust thus created and declared was in effect a conveyance to the defendant *Draeger* to the use of *August Meister* for life, and after his death to the use of *Eugene Oettinger.* No active duties were imposed upon the trustee. Consequently the transaction was covered by the provisions of sec. 2073, Stats. (1898), as interpreted in *Sullivan v. Bruhling,* 66 Wis. 472, 29 N. W. 211. The effect under this statute was to vest an absolute legal estate in *August Meister* for life, with remainder to *Eugene Oettinger,* and the judgment of the circuit court requiring a conveyance of this kind

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from the trustee, or in default thereof vesting the legal title as aforesaid, was in harmony with this statute and in conformity to law. It follows that the judgment appealed from must be affirmed.

By the Court.—Judgment affirmed.

HITE, Appellant, vs. KEENE, Respondent.

January 9—January 26, 1909.

Depositions: Adverse parties: "Without the state:" Statutes: Construction: Letters rogatory: Discretion.

1. A party residing in a foreign country is "without the state" and within the calls of sec. 4096, Stats. (1898), authorizing the examination of a party otherwise than as a witness at the trial, and providing that his deposition in that behalf may be taken without the state.
2. The provisions of sec. 4096, Stats. (1898), requiring depositions thereunder without the state to be taken in the same manner that other depositions are taken, as applied to such depositions taken in a foreign country, contemplate depositions taken either on oral interrogatories or by commission.
3. The general provisions of secs. 4113, 4114, Stats. (1898), requiring depositions taken by commission to be on written interrogatories, do not override the special provisions of sec. 4096, permitting the party whose deposition is taken thereunder to be examined on oral interrogatories.
4. It is within the discretion of the trial court to issue letters rogatory to a foreign court or tribunal in aid of an examination, under sec. 4096, Stats. (1898), of a party residing in a foreign country.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The plaintiff, a former resident of the state of Kentucky and now residing in Switzerland, brings this action for libel in the circuit court for Milwaukee county against *Francis B.*

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Keene, a former resident of the state of Wisconsin, now United States consul at Geneva. After the complaint was served the defendant procured an order appointing Robert Fazy, president of the Tribunal Premiere Instance at the city of Geneva, commissioner to take the deposition of the plaintiff, pursuant to sec. 4096, Stats. (1898), to enable the defendant to plead, and directing that the commission to take such deposition issue to such commissioner. The order also provided that letters rogatory issue in the form attached to such order. Such letters were addressed to "any judge or tribunal having jurisdiction of civil causes in the city of Geneva," with a request to such court or judge to compel the attendance of the witness *Hite* before the commissioner appointed to take his deposition by issuing the usual and customary process to compel such attendance. Plaintiff appeals from the aforesaid order.

For the appellant there were briefs by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. F. Fawsett.*

Frank M. Hoyt, for the respondent.

BARNES, J. This appeal involves two questions: (1) Can an examination be had under sec. 4096, Stats. (1898), when the party to be examined resides in a foreign country? (2) May letters rogatory issue to a foreign court or tribunal in aid of such examination?

Sec. 4096 provides for the examination of a party before or after joinder of issue, and that such examination may in all cases be taken on oral interrogatories, and that it may be taken without the state in the manner provided for taking other depositions. A party residing in a foreign country is "without the state" and comes clearly within the statutory provision. We can imagine no good reason which the legislature might have in mind in exempting residents of foreign countries from examination under sec. 4096, and it seems perfectly apparent from the language of this section

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that no such exemption was intended. We are unable to adopt the construction contended for by counsel for appellant that the words "without the state," as used in the section, should be restricted so as to authorize the taking of depositions under this section in states or territories of the United States only. The use of these words in sec. 4110, Stats. (1898), is confirmatory of the construction we place upon their use in sec. 4096.

The substantial objection to the right of examination in a foreign country is the alleged failure to provide means by which such depositions can be had. Sec. 4110, Stats. (1898), provides that depositions taken in another state or territory may be taken on oral interrogatories on notice, or by commission. The section provides, however, that depositions taken in foreign countries shall be taken by commission. Secs. 4113, 4114, Stats. (1898), and the rules of court thereunder, provide that depositions taken by commission shall be taken on written interrogatories. So it is asserted that we have a situation where the statutes provide (1) that the deposition must be taken on oral interrogatories; (2) it must be taken in the same manner that other depositions without the state are taken; (3) depositions in foreign countries must be taken by commission; and (4) depositions taken by commission must be taken on written interrogatories. If the supposed incongruity between the statutes can be avoided by reasonable construction, such construction should be adopted, for it is hardly believable that the law-making power intended to create so anomalous a situation as it is claimed exists. The legislature having to our minds clearly conferred a right to examine a resident of a foreign country by sec. 4096, the court should go far to find a remedy by which such right may be made available.

The situation is not materially different from that which the court faced in *Neeves v. Gregory,* 86 Wis. 319, 56 N. W. 909. When that case was decided, sec. 4096 provided that

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depositions taken thereunder without the state should be taken "upon commission in the manner provided for taking other depositions," in lieu of the present provision. Secs. 4113, 4114, Stats. (1898), were substantially the same as they now are in so far as they affect the question under consideration. Replying to the contention made in that case, to the effect that an examination could not be had on oral interrogatories, the court said:

"The respondent would construe the first clause of the section above quoted as though it read that the examination 'may be taken without the state upon commission in the manner provided for taking other depositions *upon commission*.' We construe the statute as though it read: 'In the manner provided for taking other depositions upon *notice or commission*.' This construction gives the right of examination upon oral interrogatories."

In analogy to what was decided in the foregoing case it may be said here that the provision in sec. 4096, requiring depositions thereunder without the state to be taken in the same manner that other depositions are taken, does not necessarily mean in the same manner that depositions are taken in foreign countries, but in the manner other depositions may be taken without the state as provided in sec. 4110, which is either on oral interrogatories or by commission.

Sec. 4096 clearly provides for taking a deposition on oral interrogatories. Reading the section in connection with sec. 4110, the deposition, when taken in a foreign country, must be taken by commission. But the general provisions of secs. 4113 and 4114, requiring depositions taken by commission to be taken on written interrogatories, should not be held to override the special provision of sec. 4096, to the effect that in taking a deposition thereunder "the party examining shall in all cases be allowed to examine on oral interrogatories." Such is the conclusion the court must have reached in the *Neeves Case*. The law as it then stood required that a deposition taken without the state under

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sec. 4096 should be taken by commission, and secs. 4113 and 4114 then imposed precisely the same barrier generally against taking depositions by commission on oral interrogatories that they do now, but the taking of a deposition by commission on oral interrogatories was expressly sanctioned.

Letters rogatory were issued to "any judge or tribunal of the city of Geneva having civil jurisdiction," requesting such judge or tribunal to issue the requisite process to compel the attendance of the plaintiff at the examination and to require him to submit thereto. While such letters may have been unnecessary in the present instance to safeguard the rights of the defendant, cases might well arise where the issuance of such letters would be essential to the promotion of the ends of justice, and we think it was within the discretion of the trial court to order that such letters be issued.

By the Court.—Order affirmed.

WAWRZYNIAKOWSKI, by guardian *ad litem,* Respondent, vs. HOFFMAN & BILLINGS MANUFACTURING COMPANY, Appellant.

January 9—January 26, 1909.

Dismissal and nonsuit: Effect: Attorney and client: Termination of authority: Judgment: Vacating: Time of application: Amendment: Discretion.

1. The legal effect of an order that "the action be and is hereby dismissed without costs to either party," is to terminate the action.
2. The entry of an order dismissing an action without costs terminates the authority of counsel, except such as is incident to receiving notice of that order.
3. Where an attorney ceases to be such for a party before receiving notice of an adversary proceeding, the year within which, under sec. 2832, Stats. (1898), the party may seek for relief from such

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proceeding does not commence to run until the party, himself, has notice.

4. Where plaintiff's counsel, after the termination of his authority by the dismissal of the action without costs, consents to the entry of a judgment of dismissal on the merits without his client's knowledge or consent, it is no abuse of discretion to proceed to correct the judgment so as to show that the action was dismissed without prejudice to the right to commence over again.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

An order was made by the superior court of Milwaukee county, presided over by Hon. J. C. LUDWIG, judge of said court, December 6, 1902, pursuant to a motion of defendant's attorneys, based on a stipulation, dismissing the action without costs to either party. No formal judgment was entered. January 8th, thereafter, a second order was entered in the action by said superior court, Hon. ORREN T. WILLIAMS, judge presiding, for a judgment dismissing the case upon the merits without costs to either party, such order being obtained without notice to plaintiff's attorney. The plaintiff was a minor. November 8, 1907, Glicksman & Gold, attorneys, were duly substituted for plaintiff's former attorney and the next day moved the court on notice to set aside the judgment entered as aforesaid, said motion being made in the circuit court before Hon. J. C. LUDWIG, circuit judge, which court was the successor to the superior court presided over by said LUDWIG and by said WILLIAMS when the first order and the second order and judgment were made. The motion was based on due proof that the judgment was rendered pursuant to an arrangement between the defendant's attorneys and the plaintiff's without the matter being brought to the attention of the guardian *ad litem* for the infant plaintiff and that such guardian had no knowledge of any of the proceedings dismissing the case until about October 22, 1907, when he immediately employed an attorney and caused pro-

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ceedings to be taken to obtain relief from the unauthorized disposition of the cause. The defendant answered by affidavit that the case was disposed of by an arrangement entered into in good faith by the defendant, acting by its attorney, and the attorney for the plaintiff, whom defendant's attorney supposed was duly authorized in the matter, whereby it was agreed that the action should be dismissed and the claimant should be re-employed by the defendant; that after an arrangement to that effect was duly made, for the purpose of having it evidenced in writing plaintiff's attorney addressed defendant's attorney a letter suggesting suitable employment of the plaintiff by the defendant as a method of satisfying his claim and avoiding the uncertainties of a lawsuit, to which defendant's attorney replied by letter that upon a proper release of any claim the plaintiff might have he would be re-employed and his doctor's bill would be paid; that pursuant to such suggestion plaintiff was re-employed, his doctor's bill was paid, and the cause was dismissed by stipulation, which did not specify whether the dismissal should be upon the merits or be a mere dismissal.

There were further affidavits to the effect that neither plaintiff nor his guardian *ad litem* consented to any settlement of the case, or knew of any such settlement, and denying that any liability for a doctor's bill, such as defendant paid, was incurred by plaintiff or his father. Before the motion aforesaid was disposed of a second motion was made for a correction of the judgment of dismissal so as to show that the cause was not dismissed upon the merits, but was dismissed without prejudice to the right to commence over again. Both motions were heard together, resulting in an order, February 24, 1908, correcting the judgment of dismissal upon the ground that it was entered inadvertently as on the merits. From such order this appeal was taken.

The cause was submitted for the appellant on the brief of *Doe & Ballhorn.*

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For the respondent there was a brief by *Glicksman & Gold*, and oral argument by *W. L. Gold*.

MARSHALL, J. It is plain from the statement that the stipulation authorized only a mere dismissal of the action and the first order was entered in exact conformity therewith. In terms and legal effect it terminated the action. The language thereof was that "the action be and is hereby dismissed without costs to either party." That certainly ended the proceeding (2 Wait, Prac. 515), leaving nothing further for appellant's attorney to do in regard thereto.

It follows that the subsequent proceedings were entirely unnecessary and outside of anything contemplated mutually by the parties, if not unwarranted. In any event, the action having been absolutely ended by the entry of the order, respondent was not bound by the person who acted as his attorney therein in receiving notice of the subsequent proceedings.

The termination of the litigation, not by a closing thereof by judgment, which of course might leave the attorney, for the time being at least, authorized to stand for respondent in any further proceedings upon the judgment, but by removing the litigation entirely from the court, ending it for all purposes, necessarily ended the authority of the attorney.

The question arises, in light of the foregoing, whether, at the time of the application for relief from the second order and the judgment based thereon, respondent was within the year period of sec. 2832, Stats. (1898), which provides that "the court or a judge may likewise, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him, through his mistake, inadvertence, surprise or excusable neglect. . . ."

It is conceded that no notice of the proceedings complained of came to the knowledge of respondent till shortly before the

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application for relief therefrom was made, unless notice to the attorney was, in legal effect, notice to the party. Doubtless the statute contemplates such to be all the notice required to set the year period running so long as the attorney's general authority in the action continues, and doubtless it continues in case of a dismissal for the purpose of receiving notice of the final order in that regard, but does it continue for the purpose of still further and unnecessary proceedings; such as could not have been reasonably within the contemplation of the parties, as the entry of a second and unnecessary order, inconsistent with the one already entered and a judgment likewise unnecessary and inconsistent? If so, when does the authority end? It seems there can be but one answer and that is that, in a case of this sort, the authority cannot, without some understanding to that effect, survive the entry of the order of dismissal except for the purposes thereof, *i. e.* for receiving notice of the entry; hence that when the person who represented respondent received notice of the second and wholly unauthorized order and judgment he was without authority in the matter and service upon him was not notice to respondent.

The rule in reason and by authority is that when the attorney ceases to be such for a party before receiving notice of an adverse proceeding, the year period mentioned in the statute does not commence to run till the party, himself, has notice. *Robbins v. Kountz,* 44 Wis. 558. So held in that case, where relief was sought under the statute and was granted because, though the person who had been the attorney for the party, but, as the court said, had practically ceased to be such, received notice within the year period, the party, himself, had not received such notice.

So the decision must be that the motion in this case was timely. That solves the question of power to make the order appealed from. Whether the power was wisely exercised or not involves mere matter of discretion, and we see no ground

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for holding there was an abuse of authority in that regard. Indeed, we do not understand appellant's counsel contend to the contrary. They rest the appeal upon the ground of want of power, under the statute, and absence of circumstances rendering the rule applicable, that a court may, regardless of mere lapse of time, correct an order or judgment so as to make the same harmonize with the actual judicial determination made and pronounced. The order in question might have been made broader so as to have set aside the second order of dismissal and the judgment entirely. But the act of merely making the same conform to the first and only authorized order was tantamount to expunging them altogether.

By the Court.—The order is affirmed.

UECKER, Appellant, vs. THIEDT, Executor, and others, Respondents.

January 9—January 26, 1909.

Appeal and error: Review: Law of the case: Descent and distribution: Rights of divorced wife.

1. The decision of the supreme court on appeal from an order sustaining a demurrer to the complaint is the law of the case, and governs in considering the sufficiency of an amended complaint interposed after such decision.
2. A wife who has obtained a divorce has no interest in the estate of her deceased husband so long as the judgment awarding her a final division and distribution of her husband's property stands unimpeached.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal by plaintiff from an order sustaining a demurrer to an amended complaint filed after a former decision in the same action. 133 Wis. 148, 113 N. W. 447.

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The only material additions to the complaint are that the property of the deceased was $25,000 instead of $16,000; that plaintiff was subjected by deceased to cruel, abusive treatment for the purpose of inducing her to enter into the agreement of separation; that upon the trial of her divorce action the deceased appeared by attorney and introduced the agreement in evidence. There are also allegations with reference to a motion in the divorce action some nine months subsequent to judgment, for modification thereof, and that deceased produced an affidavit on that motion falsely stating the amount of his property at $6,000. There also seems to be added an attempted additional cause of action to set aside the judgment of the county court admitting the will to probate on the ground of mental incompetency, undue influence, and fraud, and also to hold certain new parties to responsibility for money or property fraudulently obtained by them from the deceased.

For the appellant there was a brief by *W. C. Seefeld* and *George Sylvester,* and oral argument by *Mr. Seefeld.*

For the respondents *Thiedt* as executor and *Fischer* there was a brief by *R. Reukema* and *Otto A. Lemke;* for the respondent *Martin* there was a brief by *Houghton & Neelen;* for the respondents *Wolfgram* and others there was a brief by *A. G. Weissert,* attorney, and *Frank B. Van Valkenburgh,* of counsel; and the cause was argued orally by *Mr. Lemke* and *Mr. F. W. Houghton.*

Dodge, J. The amended complaint adds no additional fact in the way of fraud upon the court which can serve to differentiate it from the preceding one. The fact asserted that coercion or abusive treatment was added to the fraud in inducing plaintiff to enter into the agreement of separation was no more addressed to the court or effective to delude it than was the misrepresentation as to the amount of the estate. That the agreement was made was a fact, and no fur-

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ther fact is alleged to have been brought to the attention of the court to mislead it. The same consideration applies to the newly alleged action of the deceased by his attorney in producing that agreement in evidence. He thereby made no representation to the court which was not true. The rule of law laid down in the former decision, "fraud which can be made the basis of an attack upon a solemn judgment of a court of record must have directly induced the rendition of the judgment, not merely have induced or brought about a condition upon the real existence of which the court acted as the basis of its decree," is the law of this case; and now, as in the former complaint, the only fraud alleged is that perpetrated upon the plaintiff inducing her to enter into the agreement of separation and to accept $1,500 in full of her share of decedent's property. That agreement and the resulting separation became facts, and nowhere in the complaint is anything more alleged than that the existence of such facts was by the acts of the deceased husband represented to the court. This is not such fraud on the court as can justify a court of equity in granting any form of relief against a judgment. *Boring v. Ott,* 138 Wis. ——, 119 N. W. 865.

The attempted review of proceedings in county court is of course dependent upon the attack on the divorce judgment. While that stands unimpeached plaintiff has no interest in the estate, and for that reason, without considering others, can maintain no action with reference thereto.

By the Court.—Order appealed from is affirmed.

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MARINER, Respondent, vs. WIENS, Appellant.

January 9—January 26, 1909.

Signatures: Hand of another: Evidence: Sufficiency: Findings: Witnesses: Competency: Transactions with agent since deceased: Limitation of actions: "Sealed" instruments: Specialties.

1. A finding that a written agreement in issue was in fact executed and delivered by the parties as a sealed instrument is sufficiently supported as to plaintiff by testimony that it was executed by plaintiff's son in plaintiff's presence and at his immediate parol direction, although no authority under seal from plaintiff to his son is shown.
2. Plaintiff's evidence as to the acts and declarations of his agent, had in the presence and hearing of the defendant, is admissible, although the agent had since died.
3. Contracts under seal, executed by private persons, are governed by sec. 4220, Stats. (1898), permitting actions to be brought on such instruments within twenty years after the cause of action has accrued.
4. As a general rule sealed instruments, including contracts of parties, regardless of their nature, provisions, or purposes, are specialties within the limitation statutes.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action for the recovery of a balance of $701.65, with accrued interest, alleged to be due upon an express contract. Prior to March 17, 1898, defendant was engaged in business under the firm name of A. R. Wiens & Co. On that day there was due for rent to the plaintiff from the defendant the sum of $751.65. By a contract executed on that day defendant agreed, beginning May 1st of that year, to make monthly payments of at least $50 on the amount due, in addition to the monthly rent to become due by reason of the lease of certain premises owned by the plaintiff and occupied by the defendant. Interest was to be at the rate of six per cent. per annum from the 1st day of April, 1897. The in-

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strument was signed and sealed by the defendant and by the plaintiff's son in his behalf. This son of the plaintiff died about two years before the trial of this action. No power of attorney under seal from plaintiff to his son was shown on the trial. In his answer the defendant alleges that the alleged agreement set forth in the complaint is not properly executed as an instrument under seal and that the cause of action accrued more than six years before the commencement of the action.

The action was tried by the court, a jury having been waived. Plaintiff testified that his son had general powers of attorney to execute the instrument in his behalf, that his son had executed this instrument in his presence and at his immediate direction, and that he had conferences with the defendant regarding the instrument in the presence of his son. Defendant testified that these statements of the plaintiff were incorrect to the best of his belief. On May 8, 1898, the sum of $50 was paid on the contract. The court found that the defendant executed the instrument under seal, and that the instrument was signed and sealed for the plaintiff by his son in his presence and under his immediate direction. The court found that the written agreement was properly executed as an instrument under seal, that the cause of action on it was not barred by the six-year limitation statute, and that the defendant was indebted to the plaintiff in the sum of $701.65, with interest on $751.65 from April 1, 1897, to May 8, 1898, and with interest on $701.65 from May 1, 1898. Judgment was awarded for such sum and interest and the costs of the action. This is an appeal from the judgment.

The cause was submitted for the appellant on the brief of *Kading & Kading.*

Frank M. Hoyt, for the respondent.

SIEBECKER, J. The finding of the trial court to the effect that the agreement of March 17, 1898, was in fact executed

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and delivered by the parties as a sealed instrument is challenged as not supported by the evidence. The evidence on the subject is confined to the parties to the action and conflicts as to the facts pertaining to the execution of the instrument. The lower court having found as above stated, its conclusion must stand unless we can say that the finding is against the clear preponderance of the evidence. Counsel for appellant frankly concede the rule to be that if the instrument was executed by plaintiff's son in plaintiff's presence and at his immediate parol direction, then the execution is the act of the plaintiff and the instrument has validity as a properly executed sealed instrument.

We cannot say that the evidence of plaintiff is so incredible that the trial court was not warranted in relying on it as showing that the instrument was in fact signed by plaintiff's son in his presence and at his immediate direction. It is contended that, when first testifying on this point, plaintiff negatived this fact. An examination of his testimony shows that he asserted this fact and qualified it by stating that it was not clearly in his memory; but this he afterward fully remedied by his statement that he recalled defendant's presence at his desk, that they discussed the matter, that he made a change in the rate of interest from seven to six per cent., which had been inserted theretofore, and that he directed that the instrument be signed, as above stated. It is also noteworthy that defendant's testimony on the subject is that he believes plaintiff's son William appended the signature below his, and that to the best of his belief William was the only other person present. It is obvious that the defendant does not claim to have positive recollections of this part of the transaction. Upon this state of the proof the court's finding on this issue must stand as the fact of the case. The plaintiff's evidence was properly admissible in view of his testimony that defendant was in his room and presence when the agreement was finally concluded and the instrument was signed.

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It is further contended that action on this agreement is barred by the six-year statute of limitation. If the writing were a simple contract this contention would apply. Since, however, it is a sealed contract executed by private persons, we discover no grounds for excepting it from the operation of sec. 4220, Stats. (1898), which permits action to be brought on such instruments within twenty years after the cause of action has accrued. The general rule is that sealed instruments are specialties within the limitation statute, and that they include contracts of parties, regardless of their nature, provisions, and purposes. Wood, Lim. § 29; *Dwinelle v. Edey,* 102 N. Y. 423, 7 N. E. 422; *Jacobs v. Spalding,* 71 Wis. 177, 36 N. W. 608.

We hold that this is an action on a promise contained in a sealed instrument, and that the court properly awarded judgment for the amount due thereon.

By the Court.—Judgment affirmed.

DAVIS, Respondent, vs. DAVIS, Appellant.

January 9—January 26, 1909.

Executors and administrators: Ancillary administration: Claims: Contingent claims: Failure to file claim: Limitation of actions: Partnership.

1. Sec. 3844, Stats. (1898), providing that every person having a claim against a deceased person proper to be allowed by the county court, who shall not, after notice given as required by sec. 3840, exhibit his claim to the court within the time limited for that purpose, shall be forever barred from recovering such demand, applies to property and rights involved in ancillary administration had in a Wisconsin court as well as to those in domestic administration; and hence where plaintiff had a claim for her husband's share in a partnership against the estate of the surviving partner, who died a nonresident and upon whose estate ancillary administration was granted in Wisconsin, such

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claim, though unliquidated, if not seasonably presented in the ancillary administration, cannot be the basis of an action in Wisconsin courts against the distributee of the surviving partner's estate.

2. A contingent claim is one which may never accrue, where the liability depends upon some future event which may or may not happen; and therefore the fact that an accounting is necessary to determine the amount due as claimant's share in a partnership does not make the claim a contingent claim against the estate of a deceased partner.

APPEAL from an order of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an appeal from an order overruling appellant's demurrer to the respondent's complaint, which is substantially as follows:

That *Celestia L. Davis* is the widow and sole heir of one Melson J. Davis, who died intestate and without issue at the city of Milwaukee, Wisconsin, January 25, 1895; that at least fifteen years or more before his death said Davis entered into copartnership with one William H. Davis, under the firm name and style of Davis Brothers, for the purpose of buying, selling, and dealing in oils of various kinds at the city of Milwaukee, Wisconsin; that, as plaintiff is informed and believes, upon formation of said copartnership all the capital therefor was contributed and furnished by said Melson J. Davis, and for some time thereafter said William H. Davis was merely a nominal partner, but thereafter said partnership agreement was modified so as to provide that said partners were to share profits and losses equally; said partnership continued to do business until the 25th of January, 1895, when it was dissolved by the death of said Melson J. Davis; that, as plaintiff is informed and believes, during the continuance of said partnership and until his death said Melson J. Davis had the principal charge and management of said business and financial affairs of said partnership and owned and controlled a much larger interest in the

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property and assets of said firm than William H. Davis; that at the time of the death of Melson J. Davis said copartnership was in possession of a large amount of personal property and considerable real estate, also accounts and choses in action, and, as plaintiff is informed and believes, was also then indebted to various parties, and that the assets of said partnership, including personal and real property, amounted in all to $250,000; that upon the death of Melson J. Davis said William H. Davis took charge and possession of all partnership assets of said firm, and, while ostensibly proceeding to wind up the partnership affairs, he continued the business under and by the name of Northwestern Oil Company at said city of Milwaukee, and did actually run and operate said business under said name until about 1900, when he removed all the unsold portion of the stock of the old firm and other personal assets to the city of Minneapolis, Minnesota, and thereafter continued said business under the name of Northwestern Star Oil Company until his death April 23, 1903; that on the 10th day of June, 1895, plaintiff was duly appointed administratrix of the estate of said Melson J. Davis, deceased, and duly qualified as such, and on June 13, 1895, letters of administration were duly issued to her; that such proceedings were had in the matter of the estate of said Melson J. Davis that on October 1, 1898, a judgment or final decree was duly entered in Milwaukee county court whereby all the estate of said Melson J. Davis, deceased, both real and personal, including the interest in the estate of said Davis in said copartnership assets, was duly assigned to this plaintiff as his widow and sole heir; that this plaintiff ever since the entry of said decree has been and now is the owner of and entitled to receive the distributive share or proceeds of said partnership which belonged to said Melson J. Davis; that after the death of William H. Davis, April 23, 1903, without issue and unmarried, upon petition of his sister, the defendant, *Mary J. Davis,* the county court of Hennepin

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county, Minnesota, granted letters of administration with the will annexed upon the estate of said William H. Davis to *Mary J. Davis* on the 3d day of June, 1903, who thereupon duly qualified as administratrix with the will annexed of the estate of said William H. Davis; that in and by said will of said William H. Davis, deceased, defendant, *Mary J. Davis,* was named as sole legatee and devisee, subject only to certain provisions for the support and maintenance of this plaintiff should she in the future be in need of the same; that afterwards such proceedings were had that a judgment was entered in said Hennepin county court whereby all the estate of said deceased was assigned and decreed to belong to said *Mary J. Davis.*

This plaintiff alleges that the property, real and personal, so assigned to said *Mary J. Davis* was and is of the cash value of $250,000 and upwards; that among the property and assets belonging to the estate of said William H. Davis, deceased, was and is an undivided one-half interest in real estate situate in the county of Vilas, Wisconsin, also in the city of Milwaukee, Wisconsin; that on or about the 7th day of May, 1904, said *Mary J. Davis* filed in the county court of Milwaukee county, Wisconsin, a petition for ancillary administration with the will annexed upon the estate of said William H. Davis, deceased, situated in the state of Wisconsin; that such proceedings were had that on the 8th day of June, 1904, letters of administration with the will annexed upon the estate of said William H. Davis, deceased, were by said county court for Milwaukee county issued to one James W. Bryden, who thereupon qualified as such administrator and entered upon his duties as such; that on or about the 23d day of September, 1905, such further proceedings were had in said last-named matter that judgment was entered therein in said Milwaukee county court, whereby all the estate of said deceased situated in the state of Wisconsin, consisting of $73.18 in money and an undivided one-half interest in

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the real estate in Vilas county and city of Milwaukee, were assigned and decreed to belong absolutely to defendant, *Mary J. Davis;* and this plaintiff alleges that said undivided one-half interest in said real estate was and is of the value of upwards of $10,000; that the personal assets in this state consisted of only the sum of $73.18, and were not sufficient to pay the claim of this plaintiff, had it been provable in said county court that said William H. Davis left no heirs to whom any of his property descended, all of the same having been devised and bequeathed by said will to said defendant, *Mary J. Davis;* that said William H. Davis during his lifetime failed and neglected to wind up said partnership affairs, or turn the same into money, or to deliver or turn over to this plaintiff, as sole surviving heir of said Melson J. Davis, the full portion of said partnership estate to which plaintiff was and is entitled; that on the contrary said William H. Davis immediately after the death of Melson J. Davis continued the business of said firm until about 1900 and then removed to Minneapolis and continued the same until the time of his death, and that the partnership matters of said firm of Davis Brothers are still unsettled; that this plaintiff is informed and believes that said William H. Davis at the time of his death had in his hands and possession assets and property belonging to said firm of Davis Brothers and unaccounted for to the amount and value of more than $100,000, more than one half of which belongs to and is the property of this plaintiff, and that she has a contingent claim against the estate of William H. Davis, deceased, amounting to more than $50,000, which, owing to the unsettled condition of said partnership affairs, has not at any time since the death of said William H. Davis become absolute, for which reason plaintiff was unable to and did not prove or file the same in either of said county courts, and that the pretended settlement and distribution of the estate of William H. Davis, deceased, has been completed and the administrators discharged

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from their trust and property and assets of said estate of the value of upwards of $250,000 turned over and delivered to said defendant, *Mary J. Davis;* that this plaintiff is informed and believes that the share of said Melson J. Davis in the partnership property of said Davis Brothers was more than one half thereof, and that from the property and assets received by said William H. Davis as such surviving partner and unaccounted for a sum in excess of $50,000 is due plaintiff and chargeable to the estate of William H. Davis, deceased; that plaintiff has been, and will be in the future, unable with diligence to collect said indebtedness, or any part thereof, by proceedings either in the county court of Hennepin county, Minnesota, or the county court of Milwaukee county, Wisconsin, or from the respective administrators appointed by said courts, for the reason that all the property and assets of said William H. Davis, deceased, and of said firm of Davis Brothers has been assigned and turned over to the defendant, *Mary J. Davis,* and said administrators discharged from further liability.

Plaintiff demands judgment against said defendant: (1) That under direction of the court an accounting may be taken of all said partnership dealings between Melson J. Davis and William H. Davis in their lifetime, and what shall appear to be due plaintiff upon said accounting be adjudged to be paid to her; (2) that said defendant be adjudged to pay to plaintiff her due proportion of any sum found due in proportion to the amount or value of the assets received by her from the estate of William H. Davis as the just contribution which the estate of said William H. Davis ought in equity to pay, and that the sum may be adjudged to be a lien upon the real estate, and for such other relief as may be just and equitable, together with costs and disbursements.

The defendant demurred to the plaintiff's complaint upon the following grounds: (1) That the court had no jurisdic-

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tion of the subject of the action. (2) Want of facts sufficient to constitute a cause of action. (3) That the action was not commenced within the time limited by law, referring to secs. 3842, 3844, 3858, 3859, 3860, 3861, and 4222, Stats. (1898).

The cause was submitted for the appellant on the briefs of *J. W. Bass,* attorney, and *Benjamin Davenport,* of counsel, and for the respondent on the brief of *George Sylvester.*

KERWIN, J. As appears from the complaint, the respondent here seeks an accounting and prays recovery of the alleged portion of the estate of Melson J. Davis which was not distributed or received by her, but passed into the possession of William H. Davis, and the question arises whether the complaint states a cause of action. Quite a full statement of the complaint is set out in the statement of facts and need not be repeated here. Both estates were settled and distributed in county court, the domiciliary administration on the estate of William H. Davis being in Minnesota and the ancillary administration in Milwaukee county, Wisconsin, and the residue assigned to the appellant. The respondent now in this action claims an interest in the estate of William H. Davis which was never accounted for by him, but which was received by the respondent, who claimed his property by devise. The general question of laches, independent of any statutory bar to this action, is argued by appellant's counsel at great length, and it is insisted that the respondent is bound because of her laches in failing to proceed against either of the estates to enforce her claim during the administration of such estates and before final distribution. We do not regard it necessary to rest this case upon any general doctrine of laches, but rather upon our statutes and decisions thereunder. Sec. 3840, Stats. (1898), provides that at the time of granting letters testamentary or of administration the county court by order shall fix a time, not less

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than six months or more than one year thereafter, within which creditors shall present their claims for allowance, and further provides for giving notice; and sec. 3844, Stats. (1898), provides that every person having a claim against a deceased person, proper to be allowed by the court, who shall not, after notice given as required by sec. 3840, exhibit his claim to the court within the time limited for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever. Sec. 3840 provides for the giving of notice, hearing, and adjustment of claims. So far as appears from the allegations of the complaint the respondent had ample opportunity to present her claim against the estate of William H. Davis in the ancillary administration in Wisconsin. This court has held that the provisions of sec. 3844, Stats. (1898), apply to nonresident as well as to resident creditors, and to property and rights involved in an ancillary administration as well as to those in a domiciliary administration, at least so far as the courts of this state are concerned, and a creditor who fails to present his claim in an ancillary administration in this state within the time limited cannot maintain an action here against an heir of the decedent after the time for presenting claims has expired. *Winter v. Winter,* 101 Wis. 494, 77 N. W. 883; *Carpenter v. Murphey,* 57 Wis. 541, 15 N. W. 798; *Austin v. Saveland's Estate,* 77 Wis. 108, 45 N. W. 955; *Field v. Estate of Mundy,* 106 Wis. 383, 82 N. W. 343.

It appears from the allegations of the complaint that the ancillary administration was closed and the property of the estate of William H. Davis distributed by final order before the commencement of this action, and in the absence of anything appearing in the complaint to the contrary it must be presumed that the time was limited for creditors to present their claims and notice duly given. *Lannon v. Hackett,* 49 Wis. 261, 5 N. W. 474. Under sec. 3838 it being the duty of the county court to receive, examine, and adjust all claims

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against the estates of deceased persons, the right to bring an action against the executor or administrator is taken away, unless the court fails to fix a time within which claims may be presented or to give notice, and, if the time was not fixed and notice given as provided by statute, it should be made to appear in the complaint, since in such cases an action can only be maintained where facts exist taking the case out of the general rule, namely, that the settlement of the estate and bar of the claim in county court is conclusive. *Lannon v. Hackett, supra; Bostwick v. Estate of Dickson,* 65 Wis. 593, 26 N. W. 549.

It is, however, insisted by counsel for respondent that sufficient facts and circumstances are stated in the complaint to take the case out of the general rule, and this argument is based upon the idea that the claim set forth in the complaint is a contingent and not an absolute claim and therefore was not barred by the administration proceedings. In the case before us we are clear that the claim set up in the complaint is not a contingent claim. The mere fact that an accounting is necessary to determine the amount due does not make a claim a contingent claim. A contingent claim is one which may never accrue. 9 Cyc. 73. A contingent claim is one where the liability depends upon some future event which may or may not happen and therefore makes it uncertain whether there ever will be a liability. *Sargent's Adm'r v. Adm'r of Kimball's Estate,* 37 Vt. 320; *Austin v. Saveland's Estate,* 77 Wis. 108, 45 N. W. 955; *Mann v. Everts,* 64 Wis. 372, 25 N. W. 209; *South Milwaukee Co. v. Murphy,* 112 Wis. 614, 88 N. W. 583; *Brown's Ex'r v. Dunn's Estate,* 75 Vt. 264, 55 Atl. 364. What constitutes a contingent claim is very clearly stated in the case of *South Milwaukee Co. v. Murphy, supra,* as follows:

"If a liability exists, but it is uncertain whether it will ever be absolute in the sense of being enforceable, it is contingent within the meaning of the statute. The terms 'debt,'

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'absolute debt,' 'liability,' and 'absolute liability' are used in the authorities in a way to confuse and lead to wrong deductions if one does not keep in mind that the essential element of a contingent claim is uncertainty as to whether it will ever be enforceable. True, so long as a debt is absolute it is not contingent, but it is not absolute if its enforceability is dependent upon a contingency that may never happen."

We think it clear upon the facts stated that the respondent's claim should have been presented in the county court before the estate of William H. Davis was closed and distributed. That court had jurisdiction of it. *Tryon v. Farnsworth,* 30 Wis. 577, 581; *Lannon v. Hackett,* 49 Wis. 261, 5 N. W. 474; *Batchelder v. Batchelder,* 20 Wis. 452; *Hawley v. Tesch,* 72 Wis. 299, 39 N. W. 483; *Gianella v. Bigelow,* 96 Wis. 185, 71 N. W. 111. Counsel for respondent relies upon *Logan v. Dixon,* 73 Wis. 533, 41 N. W. 713; *Blakely v. Smock,* 96 Wis. 611, 71 N. W. 1052; and *Stehn v. Hayssen,* 124 Wis. 583, 102 N. W. 1074, and the argument is that there are special circumstances which take the present case out of the general rule. But it being established that the claim is not a contingent one and that there is no necessity of bringing in parties who were not before the county court at the time of the settlement of the estate, or any other special circumstances set up in the complaint which would take the case out of the general rule, no case is made upon the allegations of the complaint.

It will be seen at once by an examination of the cases cited by respondent that they are not applicable here. In *Logan v. Dixon, supra,* the claim was a contingent claim and not capable of adjustment until after settlement of the estate, and *Blakely v. Smock* and *Stehn v. Hayssen, supra,* are cases where it was necessary to bring in third parties.

The distinction between such cases and the instant case is pointed out by this court in *Gianella v. Bigelow,* 96 Wis. 185, 71 N. W. 111. None of the difficulties encountered in the cases relied upon by respondent are present here. The

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whole matter was between the respondent and the estate of William H. Davis. There are no special circumstances shown in the complaint which in any way interfered with or embarrassed the presentation, examination, and adjustment of the respondent's claim, if she had any, in the county court in the ancillary administration of William H. Davis's estate. It follows, therefore, that the complaint states no cause of action and the court below was in error in overruling the demurrer.

By the Court.—The order appealed from is reversed, and the action remanded with directions to sustain the demurrer to the complaint.

HARTMAN FURNITURE AND CARPET COMPANY, Appellant, vs. KRIEGER, Respondent.

January 9—January 26, 1909.

Sales: Executory contracts: Construction: Pleading: Complaint: Demurrer: Remedies of seller: Action for purchase price.

1. Where the gravamen of a complaint is to recover the purchase price of goods on an executory contract of sale, and the complaint clearly states a good cause of action for that purpose, on demurrer no construction is permissible which would make incidental provisions of the contract, plainly intended to secure performance of the principal obligation, paramount to such principal obligation.
2. An executory contract for the sale of household goods, which authorizes the seller to apply partial payments as rent and, at the same time, retake and resell the goods and refuse to account for the proceeds of such sale over and above the balance due upon the contract, even if incapable of enforcement, does not prevent the collection of the unpaid purchase money by an action at law, where the goods have not been retaken and are in the possession of the purchaser.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

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The appeal is from an order sustaining a demurrer to an amended complaint.

For the appellant there was a brief by *Glicksman & Gold,* and oral argument by *W. L. Gold.*

Among other references upon the part of the appellant were the following: *Willes v. Smith,* 77 Wis. 81, 45 N. W. 666; *Manson v. Dayton,* 153 Fed. 258; *Hervey v. Rhode Island L. Works,* 93 U. S. 664; *J. I. Case T. M. Co. v. Folger,* 136 Wis. 468, 117 N. W. 944.

For the respondent there was a brief by *H. V. Kane* and *F. H. Gugel,* and oral argument by *Mr. Kane.*

Among other references upon the part of the respondent were the following: *Green Bay & M. C. Co. v. Hewett,* 55 Wis. 96, 12 N. W. 382; 9 Cyc. 590, 591; *Jacobs v. Spalding,* 71 Wis. 177, 36 N. W. 608; *Weidner v. Standard L. & A. Ins. Co.* 130 Wis. 10, 110 N. W. 246; *Heryford v. Davis,* 102 U. S. 235; *Harkness v. Russell,* 118 U. S. 663, 7 Sup. Ct. 51; *Levis v. Black River Imp. Co.* 105 Wis. 391, 81 N. W. 669; *Carberry v. German Ins. Co.* 51 Wis. 605, 8 N. W. 406; sec. 2684, Stats. (1898).

TIMLIN, J. The amended complaint sets forth two separate causes of action. An order was made striking out the second cause of action. This order is not appealed from and is not before this court for review. It is argued that the demurrer applied to both causes of action and that the order sustaining the demurrer, which is of even date with the order striking out the second cause of action, must be considered as sustaining the demurrer to both causes of action. We find it unnecessary to determine this, and shall consider the order sustaining the demurrer as applicable to the first cause of action not stricken out. That cause of action avers the corporate existence of the plaintiff and "that on or about the 11th day of September, A. D. 1906, at the said city, this plaintiff delivered from its stock of furniture to the said de-

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fendant, at his special instance and request, the articles of furniture and the goods and chattels described in the annexed writing, which is hereby referred to, made a part hereof, and marked 'Exhibit A,' and that on or about the said 11th day of September, A. D. 1906, said defendant *Sol. Krieger* signed said writing and delivered the same to this plaintiff," etc. It is also averred that the goods and chattels in question are now, and have been since the last-mentioned date, in the possession of the defendant, and that the defendant has failed and neglected, after request, to pay the sum of $332.65, except the sum of $133 which has been paid, and also failed, neglected, and refused to pay the sum of $18 which became due on the 11th day of February, A. D. 1907, and failed to pay such subsequent monthly instalment of $18, and that the plaintiff elected to declare the whole unpaid balance due, and that said balance or remainder did thereupon become due and payable before the commencement of the action.

The contract, which is made a part of the complaint, so far as material here, is as follows:

"Know all men by these presents that *Sol. Krieger* of the city of Milwaukee, county of Milwaukee, and state of Wisconsin, hereinafter called the party of the first part, has received of *Hartman Furniture & Carpet Company,* a corporation of Milwaukee, Wisconsin, hereinafter called the party of the second part, the following described goods and chattels [goods described], delivered to the party of the first part under a bargain for the sale thereof and for which the party of the first part promises to pay at the office of said *Hartman Furniture & Carpet Company,* the party of the second part, in said city of Milwaukee, Wisconsin, $332.65 when the same shall become due and payable, as follows, viz.: $75 at the signing of this instrument, $——— on delivery, and the balance of $257.65 in payments of $18 payable on the 11th day of each month until the whole amount is fully paid; it being understood and agreed that all payments made as above provided or otherwise, by said first party to said second party, shall be first applied to payment of goods purchased subsequent to date hereof, if any, under

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the same ledger number, and until such subsequent purchases shall be fully paid for, and if there be no such subsequent purchases, or if the same be fully paid, then all such payments to be applied as herein provided. . . . And it is expressly understood that the said second party neither parts with, neither does the party of the first part acquire, any title to said property whatever until the said and above-mentioned amount is paid in full. And it is agreed that the party of the first part shall forfeit whatever sum is paid on the above amount and the same shall be applied as rent for the use of the above-described goods unless the full amount is paid according to the terms thereof and this agreement fully complied with by the party of the first part."

Further provisions forbidding the removal of property from the present residence of the party of the first part; forbidding the sale, assignment, mortgage, or disposal of the property by the latter without written consent; an agreement for the latter to insure, and keep insured, against loss by fire—loss, if any, payable to the party of the second part; authority to the party of the second part in default of this to procure insurance; and a provision that in case of default in the payment of the above-named sums, or any part thereof, or in case of default in any conditions of the agreement, or in case the party of the second part should feel itself insecure or unsafe, etc., the whole amount still unpaid should at once become due and payable,—cover all features of this contract proper to be considered in determining whether or not the first count in the complaint states a good cause of action.

The case is presented as if the contract in question must be either a conditional sale or a lease of the chattels. This view is too narrow. Contracts admit of infinite variety, and they are all valid except where lacking a consideration, lacking parties or capacity, lacking mutual assent, or contrary to rules of law or subversive of public morals. The question here is rather upon the construction than upon the validity of the agreement. The contract in question contains all the

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elements of an executory contract of sale. There is the agreement to pay the purchase money upon one hand, and the agreement to sell and transfer the title upon such payment on the other hand. This is the controlling or dominant feature of the contract. Added to this are several subordinate provisions: (1) Delivery to the purchaser shall take place at once and prior to the completion of payment; (2) title to the goods sold shall, notwithstanding the delivery, remain in the seller until payment is completed; (3) if the purchaser fail to complete his payments, the seller to have the right to retake the goods, giving the purchaser no credit thereon for partial payments made, but treating these payments as rent for the use of the goods; (4) if the buyer purchase other goods from the same seller, the partial payments provided for are to be applied first on the other goods so purchased.

This case does not involve any question of the validity or enforceability of the provision forfeiting or applying as rent the partial payments, and upon this question we express no opinion. Neither does it involve any question with reference to the validity or enforceability of the provision requiring the partial payments to be applied on the later purchases, and upon this we express no opinion. But, whether enforceable or not, the presence of these stipulations in the contract in no wise deprives it of its character of a contract of sale. The gravamen of the complaint is to recover the purchase price of goods on a contract of sale, and the complaint clearly states a good cause of action for that purpose. No construction of this contract which would make the provision for retaking the goods, or the provision for forfeiture of partial payments, or the provision for applying in the contingency mentioned these partial payments as rent, override or control the dominant features of sale and promise to pay, would be permissible. This would be to make the incidental provisions, plainly intended to secure performance of the principal

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obligation, paramount to such principal obligation. It may be that the plaintiff could not apply the partial payments as rent and at the same time retake and resell the goods and refuse to account for the proceeds of such sale over and above the balance due upon the contract of sale. But inability of the plaintiff to do this, if it be granted, in no way militates against its right to collect the remainder of purchase money unpaid by action at law upon contract when the goods have not been retaken but are in the possession of the defendant.

By the Court.—The order of the circuit court is reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings according to law.

DILLON, Plaintiff in error, vs. THE STATE, Defendant in error.

January 9—January 26, 1909.

Criminal law and practice: Homicide: State's duty to call eye-witness: Discretion: Instructions to jury: Manslaughter: "Heat of passion:" "Obscurement of reason:" "Deliberate:" "Premeditated:" Self-defense: Degree of offense: Consideration of various degrees: Prejudicial error.

1. Whether or not in a criminal prosecution for homicide it is proper to require the state to call an eye-witness, a point not decided, it is within the discretion of the trial court to refuse a request in that behalf and such refusal will not be held erroneous unless there is an abuse.
2. In a criminal prosecution for homicide, to justify the giving of instructions on the law of manslaughter in the first degree it should appear from the evidence (1) that the killing was done without design to effect death; (2) that it was done by the act, procurement, or culpable negligence of the defendant; and (3) that it was done while defendant was engaged in the perpetration of a crime or misdemeanor not amounting to a felony or while he was attempting to commit such crime. Hence it is not error to refuse instructions on that subject, where the

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evidence tended to show an assault or an assault and battery by defendant upon the deceased, but which had become a completed act before the homicide.

3. In a criminal prosecution for homicide it is not error to refuse to give as part of the definition of "heat of passion" a statement that heat of passion does not contemplate such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily, where "heat of passion" was completely defined in the charge, since, although the omitted statement might properly be given, it is merely illustrative.
4. As a definition of "heat of passion" the term "obscurement of reason" is not synonymous with the term "dethronement of reason."
5. In a criminal prosecution for homicide an instruction that "heat of passion" means such passion as amounts to temporary obscurement of reason and renders the slayer incapable of forming a premeditated design to kill, is not prejudicially erroneous, where the term has been otherwise fully defined in the charge.
6. In a criminal prosecution for homicide the words "deliberate" and "premeditated" may be used interchangeably in an instruction defining heat of passion.
7. Generally, in attempting to follow the statutory definition of a degree of homicide in instructions to the jury, the words of the statute should be given as they are found, with such explanation as is necessary to direct the jurors by way of defining the terms employed in the statute.
8. In a criminal prosecution for homicide an instruction that, if the homicide occurred while the accused was in the heat of passion rendering him incapable of forming a "deliberate," "premeditated" design to kill, he should be convicted of manslaughter in the third degree, is not erroneous, although neither of the quoted words appears in the statute defining that degree.
9. In a criminal prosecution for homicide it is not prejudicial error to give or refuse instructions on self-defense, where there is no evidence tending to establish justifiable homicide and the accused disclaimed killing the deceased in self-defense.
10. It is unnecessary to instruct the jury as to any degree of murder or manslaughter concerning which there is not sufficient evidence to warrant conviction.
11. In a trial for homicide it is proper to instruct the jury that consideration by the jury of a lower grade of offense would depend on its failure to convict of a higher grade, and that the jury need not consider a lower grade if it found accused guilty of a higher one.
12. An instruction that the jury might not convict of a criminal of-

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fense unless upon all the evidence, or want of evidence, the accused's guilt is established beyond a reasonable doubt, is error, unless cured in other portions of the charge.

13. The rule that an erroneous instruction is not cured, nor the presumption of prejudice thereby overcome, by a correct statement of the law on the same subject elsewhere in the charge, is subject to the qualification that prejudicial error does not follow where it is evident that no harm resulted from the erroneous instruction.

ERROR to review a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The plaintiff in error (hereinafter called the defendant) was convicted of the crime of murder in the second degree in the circuit court for Racine county in November, 1907, and was sentenced to imprisonment in the state prison at Waupun for the term of seventeen years, pursuant to the judgment of conviction. To review such judgment he brings the case to this court on a writ of error and makes the following assignments of error:

(1) The refusal of the state to call the eye-witness Hans Gibson to the stand before resting its case. (2) In submitting to the jury the question of defendant's guilt of murder in the second degree. (3) In refusing to submit to the jury the question of defendant's guilt or innocence of manslaughter in the first degree. (4) In refusing to submit to the jury the instructions requested upon "heat of passion," "reasonable doubt," and "duty to retreat." (5) In charging the jury in reference to "heat of passion," "reasonable doubt," and "duty to retreat." (6) In so submitting the case to the jury as to require it to first pass upon the guilt or innocence of the defendant as to murder in the first degree, and in excluding from its consideration the lesser degrees of homicide until in each instance it had determined the innocence of the defendant as to all higher degrees of offense. (7) In repeating and reiterating all higher degrees of the offense of felonious killing when submitting the lower degrees

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of such offense. (8) In saying to the jury that it was its duty to base its verdict as to affirmative matters upon the evidence or want of evidence in the case.

The evidence, in so far as it is material to the consideration of the errors assigned, will be found in the opinion.

The cause was submitted for the plaintiff in error on the brief of *Thomas M. Kearney* and *Mortimer E. Walker,* and for the defendant in error on that of the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *Fulton Thompson,* district attorney.

BARNES, J. 1. The defendant contends that the court, upon his request, should have directed the district attorney to call and examine one Hans Gibson, an eye-witness to the transaction; failing in this, that the court should have called said Gibson to the stand, to the end that the jury might have the benefit of the evidence of all the eye-witnesses to the homicide before the state rested its case. The denial of the requests made to this end is assigned as error.

The rule requiring the state to call eye-witnesses in a homicide case became well established in the English system of jurisprudence at a time when a defendant himself was denied the right to testify or to call witnesses in his own behalf, and when he was even denied the right of counsel. The rule no doubt was adopted to mitigate the rigor and harshness of the situation in which an individual, bound to defend himself in a case involving capital punishment, was placed by the English system of jurisprudence as it was. While the reason for the rule has ceased to exist, some courts still adhere to the ancient doctrine. *People v. Deitz,* 86 Mich. 419, 49 N. W. 296; *Territory v. Hanna,* 5 Mont. 248, 5 Pac. 252. The question is a new one in this state, and it is important in the administration of criminal law. To adopt it is to require the state to call a witness to establish its case whom the prosecuting attorney may believe is dishonest, or has been corrupted,

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and is willing to commit perjury to aid the accused, either from motives of friendship, interest, or relationship. The pursuit of such a course might often place the state at an unfair disadvantage and preclude it from showing many things that might fairly discredit such a witness. The defendant has a right to secure the testimony of such a witness if he desires, and, this being true, it would not seem that he is deprived of any right essential to his making a complete defense by reason of the failure of the state to call the witness. It is true that it is often an advantage to have the right of cross rather than direct examination. It may also be advantageous to prevent the cross-examination of a witness by the opposite party, and, in the ordinary action, the party who calls a witness vouches for his probity to a certain extent. But, while it may be a tactical advantage to the defendant to require the state to call a hostile witness whom the law officers believe may not tell the truth, it by no means follows that it is an advantage to which the defendant is legally entitled. Prosecutions in criminal cases should be carried on without malice and without desire or intent on the part of the prosecution to secure a conviction where the evidence does not warrant it. On the other hand, it would seem to be proceeding beyond the bounds of reason or of justice to require the state in all instances to call all eye-witnesses to the commission of an alleged crime. The weight of authority in this country is certainly against the contention of the defendant. *State v. Eaton,* 75 Mo. 586, 594; *State v. McAfee,* 148 Mo. 370, 50 S. W. 82; *State v. Barrett,* 33 Oreg. 194, 54 Pac. 807; *Ross v. State,* 8 Wyo. 351, 57 Pac. 924; *Keller v. State,* 123 Ind. 110, 23 N. E. 1138; *Reyons v. State,* 33 Tex. Crim. 143, 25 S. W. 786, 47 Am. St. Rep. 25; *State v. Baxter,* 82 N. C. 602; *Hill v. Comm.* 88 Va. 633, 14 S. E. 330; *State v. Morgan,* 35 W. Va. 260, 13 S. E. 385; *State v. Payne,* 10 Wash. 545, 39 Pac. 157; *State v. Hudson,* 110 Iowa, 663, 80 N. W. 232; *Comm. v. Haskell,* 140 Mass. 128,

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2 N. E. 773; 12 Cyc. 550, and cases cited under note 18; 14 Cent. Dig. CRIMINAL LAW, § 1570.

It is held in some jurisdictions that the right of the state to refuse to call an eye-witness in a criminal case is not arbitrary, but is subject to judicial discretion. *Carlisle v. State,* 73 Miss. 387, 19 South. 207; *U. S. v. Bennett,* 17 Blatchf. 357, Fed. Cas. No. 14,572; *People v. Robertson,* 67 Cal. 646, 8 Pac. 600; 14 Cyc. 549. While we do not decide that in no case is it proper to require the state to call an eye-witness, we do hold that it is within the discretion of the trial court to refuse such a request, and that such ruling will not be held erroneous unless there is an abuse of such discretion, and that this case does not disclose any abuse of the discretion of the trial court in this regard. We do not think the claim here made, that Gibson was the only eye-witness to the entire transaction that led up to the homicide, was sufficient to render it obligatory upon the state to call him, in view of the relations existing between him and the defendant and the apparently conflicting statements made by him in reference to the occurrence.

2. It is next contended that the evidence did not warrant a conviction for murder in the second degree, and that this degree of homicide should not have been submitted to the jury for consideration. No useful purpose would be served by stating the evidence justifying the submission of this degree of homicide. Under the decisions of this court in the cases of *Odette v. State,* 90 Wis. 258, 62 N. W. 1054; *Flynn v. State,* 97 Wis. 44, 72 N. W. 373; and *Johnson v. State,* 129 Wis. 146, 108 N. W. 55, the court was clearly right in its submission of murder in the second degree.

3. The defendant requested the court to submit manslaughter in the first degree, requesting a charge thereon in the language of sec. 4346, Stats. (1898), which request was refused. In order to justify such charge it should appear from the evidence (1) that the killing was done without design to effect death; (2) that it was done by the act, pro-

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curement, or culpable negligence of the defendant; and (3) that it was done while defendant was engaged in the perpetration of a crime or misdemeanor not amounting to a felony or while he was attempting to commit such crime. There was testimony tending to show that the killing was done without design to effect death, and the evidence is practically undisputed that the killing was done by the defendant. If there was any credible evidence in the case sufficient to support a conviction and tending to show that the killing was done while the defendant was engaged either in perpetrating or in attempting to perpetrate a crime or misdemeanor not amounting to a felony, the charge requested should have been given. *Montgomery v. State,* 128 Wis. 183, 197, 107 N. W. 14; *Duthey v. State,* 131 Wis. 178, 182, 111 N. W. 222, and cases cited; *Terrill v. State,* 95 Wis. 276, 70 N. W. 356. The evidence in this case fails to show that the killing was done while defendant was engaged in the perpetration of a crime or misdemeanor not amounting to a felony, or in an attempt to perpetrate such crime or misdemeanor, and, this being true, it was not error to refuse to charge as requested. *Fertig v. State,* 100 Wis. 301, 75 N. W. 960; *Montgomery v. State,* 128 Wis. 183, 197, 107 N. W. 14. There is some testimony tending to show that, a short time before the shot was fired which resulted fatally, the defendant kicked, or kicked at, the deceased, under such circumstances as might render him guilty of either an assault or assault and battery. There is no testimony which has even a tendency to show that the killing was done while the defendant was engaged in the perpetration of such assault. The testimony of the witnesses is not in harmony as to the length of time that elapsed between such assault and the shooting. The sworn testimony given on the trial is to the effect that after such assault took place the deceased retreated to the door of the saloon, and either went out or went partially out, the defendant following him up, for the purpose, he says, of closing the door. The de-

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ceased pushed the door open, and, according to some of the witnesses, kicked the defendant, whereupon the defendant shot him. Under this testimony the defendant was doing what he had a perfect right to do, in closing the door of his place of business, and he was not engaged in the perpetration of any misdemeanor or crime below the grade of a felony when the revolver was discharged. The evidence that comes closest to connecting the assault with the shooting is the *ante mortem* statement of the deceased, offered upon the trial, but we think a fair construction of this testimony does not lead to the conclusion that the killing was done while the defendant was perpetrating a crime less than a felony, but that the assault referred to was a completed act before the pistol was discharged.

4. Error is assigned upon the charge of the court in reference to "heat of passion," and upon the refusal of the court to charge as requested by the defendant. The court charged the jury as follows:

"The term 'heat of passion,' as used in this section and in these instructions, means such passion as amounts to temporary obscurement of reason, and renders the slayer incapable of forming a premeditated design to kill. The heat of passion which will reduce what would otherwise be murder to manslaughter in the third degree is such mental disturbance, caused by reasonable, adequate provocation, as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason; make him incapable of forming and executing that distinct intent to take human life essential to murder in the first degree; and to cause him, uncontrollably, to act from impelling force of the disturbing cause rather than from any real wickedness of heart or cruelty or recklessness of disposition."

Excluding the first sentence of the charge, the remaining portion of it is taken *verbatim* from the definition of "heat of passion" in *Johnson v. State,* 129 Wis. 146, 160, 108 N. W. 55, 59. In the *Johnson Case* the court said, in addition to the language quoted, that "such heat of passion does not

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contemplate such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily."

It is urged that the court erred in refusing to give as part of his definition of "heat of passion" the sentence last quoted, and also in instructing the jury that the term meant "such passion as amounts to temporary obscurement of reason," which rendered the slayer "incapable of forming a premeditated design to kill." Referring to the omission from the instruction given of the sentence found in the *Johnson Case,* we do not think it is any part of the definition of heat of passion in that case. It is a statement intended to be illustrative merely, and one that might very properly have been given, but one which we do not think it was error to refuse. The affirmative definition of heat of passion was given in its entirety. There are many things that heat of passion does not contemplate, and the statement that "heat of passion," as used in the statute, "does not contemplate such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily," really adds nothing to the definition.

The charge of the court to the effect that "the term 'heat of passion,' as used in this section and in these instructions, means such passion as amounts to temporary obscurement of reason, and renders the slayer incapable of forming a premeditated design to kill," was perhaps superfluous, as the term was otherwise fully defined in the charge. The term "obscurement of reason" is not synonymous with the term "dethronement of reason," which has been held to constitute an incorrect definition of "heat of passion." *Johnson v. State,* 129 Wis. 146, 163, 108 N. W. 55, 61; *Duthey v. State,* 131 Wis. 178, 111 N. W. 222. The word "obscure" means not clear, full, or distinct; clouded; imperfect. Webst. Dict. This court has apparently construed the words "temporary dethronement of reason" as being equivalent to temporary insanity. *Duthey v. State,* 131 Wis. 178, 111 N. W. 222.

Under the definition formulated in *Johnson v. State* the

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mind must be "deaf to the voice of reason," and the defendant must be "incapable of forming and executing that distinct intent" essential to the crime of murder in the first degree. If there is any essential difference between such a mental condition and one where the mind is obscured, clouded, or imperfect, it would seem that the portion of the instruction complained of was favorable to the defendant. Any conclusion that it was harmful would have to be reached by a process of reasoning too refined for practical purposes. The instruction criticised was fully justified by the language used in *Perugi v. State,* 104 Wis. 230, 240, 80 N. W. 593, and we do not think the *Johnson Case* should be construed as overruling what is there said in reference to the meaning of "heat of passion."

Exception is also taken to the remarks subsequently made in the charge of the court on "heat of passion," by which the jury was instructed: "If you find . . . that the homicide was committed while the defendant was in the heat of passion, such passion as amounted to temporary obscurement of reason, as hereinbefore explained, rendering him incapable of *deliberate, premeditated* design to kill," a verdict of guilty of manslaughter in the third degree may be returned, provided the other elements essential to the commission of the offense are found to exist. This statement simply amounted to a repetition of a portion of what was said in the definition previously given, and in the instruction the attention of the jury was called to the meaning of the term "heat of passion" as before explained. There was no error in this portion of the instruction, at least in so far as it related to "heat of passion."

5. Exception is also taken to the following portion of the charge:

"If, therefore, you find from the evidence, beyond a reasonable doubt, that at the time and place charged the defendant shot Jacob C. Best, thereby causing his death, . . . but

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do find, beyond a reasonable doubt, that the homicide was committed while the defendant was in the heat of passion, such passion as amounted to temporary obscurement of reason, as hereinbefore explained, rendering him incapable of forming a *deliberate, premeditated* design to kill, and further find that such homicide was committed by a dangerous weapon, without any design to effect death, then you are at liberty to find the defendant guilty of manslaughter in the third degree, unless you find that such homicide was justifiable or excusable as hereinafter explained."

The defendant contends that the court not only erred in defining "heat of passion" in this portion of the charge, but also in using the words "deliberate" and "premeditated" before the word "design." Neither of the objectionable words appears in the statute defining manslaughter in the third degree. The statute defining murder in the first degree does not use the word "deliberate" in connection with the words "premeditated design."

The argument to support the alleged error is that a "deliberate, premeditated design" means something more than a mere design, and that to require the mind to be so dominated by passion as to be incapable of a "deliberate, premeditated design" was to require more than incapacity to simply form a "design." The words "deliberate" and "premeditated" may be used interchangeably in the connection in which they are used here. *Perugi v. State,* 104 Wis. 230, 238, 80 N. W. 593, 595. There is no difference between the terms "design" and "premeditated design" as used in our statutes defining murder and manslaughter. This subject was fully discussed by RYAN, C. J., in *Hogan v. State,* 36 Wis. 226, and his conclusions are summed up in the following paragraph:

"We take the 'premeditated design' of our murder in the first degree to be simply an intent to kill. Design means intent, and both words essentially imply premeditation. The premeditation of the statute does not exclude sudden intent, and need not be slow or last long. This very plainly

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appears, not only by the force of the words used, but also by the apparent use, throughout the definitions of murder and manslaughter, of the terms, 'design' and 'premeditated design,' to effect death, as coequal terms."

While the decision in the *Hogan Case* in this regard might be held to be modified to some extent by the holding in *Terrill v. State,* 95 Wis. 276, 70 N. W. 356, and *Sullivan v. State,* 100 Wis. 283, 75 N. W. 956, the latter cases were considered in *Perugi v. State,* 104 Wis. 230, 240, 80 N. W. 593, and in so far as they were in conflict with the decision in *Hogan v. State* the court declined to follow them and expressly followed the doctrine quoted from the *Hogan Case.* To the same effect are *Miller v. State,* 106 Wis. 156, 81 N. W. 1020, and *Cupps v. State,* 120 Wis. 504, 542, 543, 97 N. W. 210, 98 N. W. 546. In the case last cited the question is exhaustively discussed, and reasons for the varying lines of authorities upon the subject are pointed out. In attempting to follow the definition of one of the degrees of homicide as found in the statute, it is a safe general rule to give the words of the statute as they are found, with such explanations as are necessary for the direction and the guidance of the jurors by way of definition of the terms employed in the statute. We do not think, however, that any error was committed in giving the instruction.

6. Error is assigned because the court refused to give the following instruction:

"You are further instructed that if you find from the evidence the defendant was assaulted in his place of business by the deceased in such a way as to induce in defendant a reasonable belief of losing his life or of suffering great bodily harm, he was not obliged to retreat or flee from the deceased. He may stand his ground and repel force by force, and if need be, of which you are the sole judges under the instructions I have given you, kill his adversary."

Two other instructions given by the court, and bearing upon the question of self-defense, are excepted to. These

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exceptions can well be disposed of by saying that there was no testimony in the case tending to establish a case of justifiable homicide as defined by subd. 2, sec. 4366, Stats. (1898). None of the witnesses for the state testified to any fact which would even remotely tend to establish a defense of self-defense. It is true the witness Gibson did testify that, while the parties were four feet apart and the defendant was holding a revolver in his right hand, the deceased kicked him, and it is also true that the defendant testified to the same fact. The naked facts so testified to did not show any real or apparent necessity for taking the life of Best, and the defendant does not claim or testify that there was any necessity for his doing so, and disclaimed killing the deceased in self-defense. He testified that the discharge of the gun was involuntary and unintentional, and that he had no design or purpose to kill his alleged assailant, and did not know as a matter of fact that Best was shot until some time after he left the saloon. The cases heretofore cited show that it is unnecessary to instruct the jury as to any degree of murder or manslaughter concerning which there is not sufficient evidence to warrant a conviction. The same rule applies to the submission of justifiable homicide. *Fertig v. State,* 100 Wis. 301, 75 N. W. 960; *Montgomery v. State,* 128 Wis. 183, 107 N. W. 14; *Bird v. State,* 77 Wis. 276, 45 N. W. 1126.

7. It is insisted that the court made an erroneous submission to the jury, in that he in effect instructed it that it must first take up the question of murder in the first degree, and, if it did not find the necessary facts to convict, it should then take up the next lower degree of homicide, and so proceed down the line until it came to the questions of justifiable or excusable homicide. In instructing the jury as to each particular degree of homicide the court said that the consideration by the jury of the lower grade would depend and be conditioned upon its failure to find the defendant guilty of some

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higher grade of offense. The order in which the jury was instructed to take up the consideration of the case was entirely proper, and it was proper for the court to say to the jury that it need not consider a lower grade of offense if it found the defendant guilty of a higher one.

8. Among other things the court instructed the jury as follows:

"The state does not desire the conviction of any person charged with the commission of an offense unless upon all the evidence in the case, *or want of evidence,* considered under all the rules of law applicable thereto as given to you by the court, and in the face of the presumption of innocence and all the protection with which the law guards one accused of crime, such person's guilt is established to the satisfaction of the jury, and each member thereof, beyond a reasonable doubt."

The vice of this instruction consists in the fact that a jury might very well interpret it to mean that it would be justified not only in convicting on the evidence but also because of the want of evidence. Obviously, this is not what the court intended to say to the jury; but the intention in the mind of the court, except as expressed, is not before the jury for consideration. What the court evidently had in mind was that a reasonable doubt might arise from want of evidence, and that a defendant might be entitled to acquittal on the state of the evidence itself, or because of lack or want of evidence on some material point. To say to the jury that it could convict for want of evidence, as was done in this case, is error, unless it is cured in other portions of the charge.

In charging generally, and under the various degrees of homicide submitted, the court iterated and reiterated a dozen times that unless the jury was satisfied, beyond a reasonable doubt, from the evidence offered, of the guilt of the defendant, it was its duty to acquit. In *Perkins v. State,* 78 Wis. 551, 47 N. W. 827, the court gave an erroneous charge on the law of self-defense. The error was repeated in short,

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pithy instructions, and it was held that it was not cured by a correct statement of the law made in a long and an involved sentence. It does not follow, however, that, because a statement in a charge is inaccurate, reversible error results therefrom. *Richards v. State,* 82 Wis. 172, 182, 51 N. W. 652. The language in *Schmidt v. State,* 124 Wis. 516, 519, 102 N. W. 1071, to the effect that "an erroneous instruction is not cured, nor the presumption of prejudice therefrom overcome, by a correct statement of the law on the same subject elsewhere in the charge," is subject to the qualification that prejudicial error does not follow where it is evident that no harm resulted from the erroneous instruction. *Eggett v. Allen,* 106 Wis. 633, 638, 82 N. W. 556; *Annas v. M. & N. R. Co.* 67 Wis. 46, 63, 30 N. W. 282; *Middleton v. Jerdee,* 73 Wis. 39, 40 N. W. 629. The solecism in the language here used was so obvious, and a correct statement of the law was so repeatedly given, that it would seem to be entirely without the field even of possibilities that the jury could have been misled. We find no prejudicial error in the record.

By the Court.—Judgment affirmed.

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2. Sec. 3070, Stats. (1898), applies only to orders which are a part of the record proper without being incorporated into the bill of exceptions, and does not apply to rulings or orders of trial courts granting or refusing motions to direct a verdict. *Ibid.*

3. In the absence of a proper motion for a new trial and an appropriate exception to its denial, an order directing a verdict will not be reviewed unless it is excepted to. *Ibid.*

4. A finding is conclusive on appeal where there is no exception thereto and the evidence is not preserved by bill of exceptions. *Hoffman v. Lincoln County,* 353

5. An order for judgment on a special verdict is properly part of the judgment roll and therefore no exception is necessary to procure its review. *Billington v. Eastern Wis. R. & L. Co.* 416

6. A written direction changing the answer to a question of the special verdict incorporated into the order for judgment upon that verdict is within the class of orders mentioned in sec. 3070, Stats. (1898), and may be reviewed in the supreme court in the absence of exception thereto. *Ibid.*

Same: Motions for new trial. See APPEAL, 1, 3.

7. It is not necessary to make a motion for a new trial in order to review a ruling of the trial judge granting a motion for a directed verdict. *Beebe v. Minn., St. P. & S. S. M. R. Co.* 269

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9. In an action in equity error cannot be assigned on the admission, or on the refusal to strike out, evidence, if there is sufficient other evidence to support the judgment. *Schumacher v. Draeger,* 618

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10. Language of counsel in a brief for a rehearing, stated in the opinion, is *held* disrespectful and in violation of Supreme Court Rule 51. *Rahles v. J. Thompson & Sons Mfg. Co.* 506

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11. An exception to the court's ruling on defendant's demurrer on the ground of defect of parties defendant need not be considered, where it appears that on consent of the parties the alleged defect has been cured by an order making the alleged necessary party a defendant. *Steele v. Korn,* 51

12. In such case the imposition of $10 costs as a condition of answering on overruling defendant's demurrer furnishes no basis of complaint, where it appears that defendant participated in the trial to the extent of offering his evidence and presenting his claims to the court by counsel. *Ibid.*

13. Where findings in favor of the defendant in a special verdict are supported by credible evidence, on appeal from an order setting aside such findings it is unnecessary to consider the evidence offered by the plaintiff on the trial, except in so far as it may tend to render that offered by the defendant so inherently incredible as not to be worthy of belief. *Dorwin v. Hagerty,* 161

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15. On appeal by defendants from an order denying their motion to set aside a judgment on the ground that their attorney, who had purchased the lands involved from them *pendente lite,* had defended the action in their names without their authority or consent, the order refusing to vacate the judgment was presumed to have gone upon evidence, stated in the opinion, from which the court might have found that the action was defended in defendants' name with their consent. *Emerson v. McDonell,* 263

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16. Findings of fact not contrary to the clear preponderance of the evidence will not be disturbed on appeal. *Anderson v. Savoy,* 44

17. If there is any credible evidence in the case to support the findings of the jury it is error to set aside such findings as are so supported and grant a new trial. *Dorwin v. Hagerty,* 161

18. The conclusion of a trial court respecting sufficiency of evidence as to an issue of fact to require its solution by the jury should not be disturbed upon appeal unless it appears, clearly, that such conclusion was wrong, giving due weight to the superior advantages of the trial court for understanding the situation. *Clemons v. Chicago, St. P., M. & O. R. Co.* 387

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Same: Conclusiveness of findings.

19. In an action for the value of a cream separator, tried by the court, absence of exception to any finding except that of reasonable value renders the findings conclusive as to all other facts to which they relate. *Jones v. De Muth,* 120

20. In such case the only question on appeal is whether the finding as to the value being $100 is supported by any evidence, there being no evidence to the contrary. *Ibid.*

21. Where, in an action for the value of a cream separator, it appeared from the evidence that the seller on two occasions had sent to the buyer bills specifying a designated price, and that the buyer had received and retained each bill but had made no objection to the price, a finding of such price as the reasonable value of the separator had some evidence to support it and could not, therefore, be set aside on appeal. *Ibid.*

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22. Where an examination of the evidence shows that a verdict is not without support therefrom, an assignment of error for denying a motion to set aside the verdict and grant a new trial cannot be sustained. *Wheeler v. Milner,* 26

23. In case of a judgment being improperly rendered because the cause of action alleged did not exist when the action was commenced, and the infirmity can be cured, the result of the trial should not be disturbed except in so far as to prevent any substantial prejudice to the adverse party. *Hilliard v. Wisconsin Life Ins. Co.* 208

24. On review of a judgment determining appellant's right in lands, if he obtains by the judgment all he is entitled to, it is immaterial as to him to what source his title is referable. *Poluckie v. Wegenke,* 433

25. Where each party before the trial court was awarded judgment for just what he or she was entitled to, and as between appellant and other parties interested, if there were any such, the situation was unaffected by the judgment, the supreme court affirms the judgment. *Ibid.*

26. The rule that an erroneous instruction is not cured, nor the presumption of prejudice thereby overcome, by a correct statement of the law on the same subject elsewhere in the charge, is subject to the qualification that prejudicial error does not follow where it is evident that no harm resulted from the erroneous instruction. *Dillon v. State,* 655

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27. The decision of the supreme court on appeal from an order sustaining a demurrer to the complaint is the law of the case, and governs in considering the sufficiency of an amended complaint interposed after such decision. *Uecker v. Thiedt,* 634

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Determination and disposition of cause: Correction of mandate.

28. Where on appeal the judgment of the lower court was held erroneous because it awarded a vendor's lien instead of an equitable lien, and it was the intention of the appellate court to affirm the judgment because there was no material difference in the legal consequences of the two liens and hence the error was not prejudicial, but by inadvertence a mandate of reversal was entered, the appellate court, of its own motion, corrects the mandate and directs entry of judgment of affirmance. *Poole v. Tannis,* 363

Appeal from justice's court. See JUSTICES' COURTS.

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Appeal from arbitrators. See ARBITRATION AND AWARD, 3.

Appeal from common council. See MUNICIPAL CORPORATIONS, 20–23.

ARBITRATION AND AWARD.

See MUNICIPAL CORPORATIONS, 11.

1. Where the written award of arbitrators is directly responsive to the one question submitted, What is the value of a waterworks plant? and declares that the arbitrators have ascertained and fixed the value of such property, upon its face the award is as final and conclusive between the parties as the judgment of any other tribunal having jurisdiction to decide such question, not excepting a court of law or equity. *Eau Claire v. Eau Claire Water Co.* 517

2. Every presumption is in favor of such an award, and its invalidity must be shown, by any one asserting it, by clear and satisfactory evidence. *Ibid.*

3. On an arbitration, all questions of judgment within the submission are concluded by the decision of the arbitrators, and are not subject to appeal and review by the court. *Ibid.*

4. Under a submission to arbitration of the single question, What is the value of a waterworks plant? the arbitrators have plenary power to decide questions of admissibility, competency, and weight of evidence. *Ibid.*

5. Arbitrators are competent witnesses before themselves, are not excluded from the use of their own expert knowledge, and are not confined to testimony from witnesses under oath. *Ibid.*

6. The testimony of arbitrators as to what transpired in the hearing and deliberation will not be received to impeach their award. *Ibid.*

7. The question of value is illusive, and a fact that may be controlling and significant with reference to one class of property, or under certain circumstances, sinks into comparative insignificance under others, and every element or consideration varies in its influence according to the judgment and experience of the person who is to decide on a value as between buyer and seller; hence it is improper to permit an attack upon an award of arbitrators upon an intricate question of value by attempting to review their mental processes as imperfectly disclosed by them on cross-examination. *Ibid.*

8. On review of an award by arbitrators to whom was submitted the single question of the value of a waterworks plant, under

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the evidence, stated in the opinion, it is *held* that no such glaring undervaluation was shown as to convict the arbitrators of arbitrary or fraudulent action. *Ibid.*

ARCHITECTS. See CONTRACTS, 11–14.

ARGUMENT OF COUNSEL. See APPEAL, 10. TRIAL, 5, 6.

ARSON.

1. The offense of burning the dwelling house of another, covered by sec. 4399, Stats. (1898), is the same as that of such burning by common law. *Kopcyznski v. State*, 358

2. The offense of burning the dwelling house of another relates to the security of the habitation, not to that of property. *Ibid.*

3. In case of the felonious burning of the dwelling house of another, the idea is that the house of such other is his to occupy as a habitation, regardless of the title to the property. One may be guilty by burning his own house, when it is the dwelling house of another, but cannot if it is his own habitation. So neither husband nor wife can be guilty of such offense by burning the dwelling house which they jointly occupy as a home, regardless of the status of the title. *Ibid.*

4. In charging the offense of burning the dwelling house of another, it is proper to allege the dwelling house to be that of him who occupies the structure as a habitation, though he may have no property right therein. *Ibid.*

5. The rule that a husband or wife cannot be, under any circumstances, properly charged with the offense of burning the dwelling house which the two jointly occupy as their habitation, does not apply where it is the habitation of but one; the other, though the marital relations still exist, having left the same to reside elsewhere. *Ibid.*

6. In the case last suggested, the status of the title to the property is immaterial, except as it may bear on the question of fact respecting joint occupancy of the property burned as a dwelling house. *Ibid.*

ASSAULT AND BATTERY. See HOMICIDE, 2. INDIANS, 1, 3–6.

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ASSIGNMENTS.

Splitting of demands: Debtor's nonconsent: Liability of assignor.

1. A debt cannot be split up by a creditor against the debtor's consent, even by formal assignments, since the debtor has the right to pay his debt *in solido* and to refuse to be subjected to claims or suits by various claimants. *Thiel v. John Week L. Co.* 272

2. Where a debtor has refused to consent that his debt be split up by partial assignments, the creditor can maintain his action to recover the entire debt, notwithstanding there be outstanding unaccepted orders drawn by the creditor in favor of third persons. *Ibid.*

ASSIGNMENTS OF ERROR. See APPEAL, 1, 6–9, 22.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 14–20.

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ATTORNEY AND CLIENT.

Retainer and authority. See DISMISSAL AND NONSUIT, 10.

1. The entry of an order dismissing an action without costs terminates the authority of counsel, except such as is incident to receiving notice of that order. *Wawrzyniakowski v. Hoffman & Billings Mfg. Co.* 629
2. Where an attorney ceases to be such for a party before receiving notice of an adversary proceeding, the year within which, under sec. 2832, Stats. (1898), the party may seek for relief from such proceeding does not commence to run until the party, himself, has notice. *Ibid.*
3. Where plaintiff's counsel, after the termination of his authority by the dismissal of the action without costs, consents to the entry of a judgment of dismissal on the merits without his client's knowledge or consent, it is no abuse of discretion to proceed to correct the judgment so as to show that the action was dismissed without prejudice to the right to commence over again. *Ibid.*

AUTOMOBILES. See MASTER AND SERVANT, 21, 23.

AWARDS. See ARBITRATION AND AWARD.

BANKRUPTCY.

Preferences.

1. In an action by a trustee in bankruptcy to recover a payment made to a creditor of the bankrupt, alleged to have been made as a preference, an instruction to the jury as to the words "reasonable cause to believe that it was intended to enable the [creditor] bank to obtain a greater percentage of its debts than other creditors would be able to obtain," stated in the opinion, is erroneous where the jury were thereby warranted in finding against the creditor, although he did not have reasonable cause to believe in the bankrupt's intent to give a preference. *Stuart v. Farmers Bank,* 66
2. Under the federal bankruptcy act it is only when the facts known to the creditor are such as would induce a present belief in the ordinarily prudent and intelligent business man that his debtor is insolvent and intends a preference that the creditor is prohibited from collecting or securing his debt or a part thereof. *Ibid.*
3. An action to foreclose a mortgage was defended on the ground that the mortgage was void as a preference under the federal bankruptcy act. Under the facts, stated in the opinion, *held:*

   (1) In the absence of fraud, actual or constructive, such mortgage, though unrecorded, gave to the mortgagee a lien upon the mortgaged property for the sums thereafter advanced under it, good as between the parties and as to all the world except subsequent purchasers or mortgagees in good faith and for a valuable consideration.

   (2) The trustee in bankruptcy had no greater right to set aside the conveyance or transfer than the bankrupt himself had, except so far as the bankruptcy act empowered him to avoid such transactions.

   (3) Under subd. *a* and *b*, sec. 60, and subd. *d*, sec. 67, of the federal bankruptcy act of 1898, the creditor was entitled to judgment of foreclosure.

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SIEBECKER and KERWIN, JJ., dissenting, are of the opinion that the mortgage constituted a preference and hence was fraudulent and void under the federal bankruptcy act. *Claridge v. Evans*, 218

4. The giving of a mortgage or other lien to secure the repayment of a present loan, or a loan to be made in the future, is not a preference. In order to constitute a preference there must be an existing antecedent debt upon which a payment is made or for which security is given. A security given for a debt created at the time is a present security and not a preference created by the mortgage. *Ibid.*

5. A preference contemplates a class of existing creditors, one of whom is singled out for preference. *Ibid.*

6. The word "preference" means that one person is favored above others who before the favor was shown stood on equal footing. *Ibid.*

7. The concluding clause of subd. *a*, sec. 60, of the federal bankruptcy act, does not define a preference nor purport to make a preference out of a transaction which was not a preference before, and only applies where the transfer itself constitutes a preference. *Ibid.*

8. Where a debtor, when the four-months period under subd. *a*, sec. 60, of the federal bankruptcy act began, owed the creditor $5,000, and the creditor's security was only of the value of $1,725, as to the sum of $3,275 the creditor was unsecured, and he could not, with knowledge of his debtor's insolvency, retain a payment on his unsecured debt within the four-months period, where this would give him a greater percentage than any other unsecured creditor. *Ibid.*

9. In such case the debt of the creditor, after exhausting his security, became of the same class as all other unsecured contract debts which are not given priority by the terms of the bankruptcy act. *Ibid.*

10. Where a creditor was the active manager of the entire business of a corporation, bankrupt from the time he accepted a mortgage securing him for advances to be made up to the time of the adjudication, and in fact was the only person who had personal and accurate knowledge of its affairs, and, as secretary, in fact made the alleged preferential payments to himself, the creditor was in effect both debtor and creditor, and whatever he knew in one capacity he knew in the other. *Ibid.*

11. In such case, under subd. *a*, sec. 60, of the federal bankruptcy act, the creditor must be deemed to have known that all the facts existed which were necessary to condemn the payments as preferential and as so intended. *Ibid.*

12. In such case the omission of any finding to the effect that the creditor had reasonable cause to believe that a preference was intended when the payments were made is not ground for reversal of a judgment in favor of the trustee in bankruptcy for the recovery of such preference. *Ibid.*

Construction of statutes: Stare decisis.

13. The construction of the federal bankruptcy act finally rests with the federal courts and at last with the supreme court of the United States, and in case of no difference of opinion among those courts, or if the supreme court has finally spoken on that

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subject, the state court should be guided by such utterance, otherwise it is the duty of the state court to decide for itself. *Stuart v. Farmers Bank,* 66

14. When the state court upon full consideration has decided for itself the proper construction of the federal bankruptcy act, the rule of *stare decisis* would seem to require adherence to that decision, especially where the view thus established is supported by the later utterance of the federal supreme court. *Ibid.*

BARKEEPER. See INTOXICATING LIQUORS, 2, 3.

BEQUESTS. See WILLS, 4, 6.

BILL OF EXCEPTIONS. See APPEAL, 2, 4, 8.

BILLS AND NOTES.

Requisites and validity: Execution and delivery.

1. Under the elements of an agreement, stated in the opinion, a delivered note did not become a completed contract *in præsenti,* and the oral agreements relative to its status did not contradict the note itself. *Paulson v. Boyd,* 241

Same: Consideration. See BROKERS, 1.

2. While in the case of a nonpatented article there can be no such thing as the sale of territory or exclusive territorial rights in the sense in which the terms are used with regard to patented articles, such selling rights may constitute good consideration for promissory notes. *Kipp v. Smith,* 234

Rights and liabilities on indorsement or transfer: Holder in due course.

3. Where there is no direct evidence showing that plaintiff, indorsee of a promissory note, knew the nature of the consideration thereof, but there was much evidence of a circumstantial character tending to show that he had considerable knowledge of the business in which the original payees of the note were engaged and of the circumstances under which such note, and others which he purchased at the same time, were given, it is not error to submit to the jury the question whether the plaintiff was a holder in due course. *Kipp v. Smith,* 234

4. Under sec. 1676—26, Stats. (Supp. 1906), governing negotiable instruments, it is error to instruct the jury that if the indorsee of a promissory note had notice of facts which would put a man of ordinary intelligence and prudence upon inquiry he would be charged with knowledge of the facts which the inquiry would have shown, and that, if he was guilty of gross negligence in not following up the inquiry which facts known to him suggested, the law would charge him with notice of all the facts which he might have ascertained by the inquiry, and he could not be a purchaser in good faith. *Ibid.*

5. While gross negligence is evidence from which bad faith may be inferred, it does not of itself constitute bad faith as matter of law. *Ibid.*

[6. Whether a person can be said to be a holder of a negotiable instrument in due course who, without inquiry, takes from an officer of a corporation, in payment of a private debt, a negotiable note which appears on its face to be the property of the corporation, suggested, but not decided.] *Ibid.*

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7. In order to be a holder in due course the transferee must take the instrument "in the usual course of business." *Ibid.*

Same: Bona fide purchasers.

8. A newly incorporated bank having obtained the assets of a private bank, including the note of defendant on which the instant action was brought, pursuant to a resolution of the stockholders instructing the directors to assume the liabilities of the private bank in consideration of the transfer of such assets, defendant's note being subject to an oral agreement whereby it never became a completed contract *in præsenti*, the defendant can assert such incompleteness as a defense to the note in the hands of the new bank. *Paulson v. Boyd*, 241

BIRTHS: Registration. See CRIMINAL LAW, 6.

BONA FIDE PURCHASER. See BILLS AND NOTES, 4, 8.

BOOKS OF ACCOUNT. See EVIDENCE, 11–16.

BRIEFS. See APPEAL, 10.

BROKERS.

1. In an action on a note claimed to have been executed to plaintiff's assignor in consideration of the services of the assignor in securing a purchaser for a boat, the evidence, stated in the opinion, is *held* to support findings by the jury in favor of the defendant. *Dorwin v. Hagerty*, 161

2. In an action on a contract whereby a broker was to procure a purchaser for defendant's interest in a boat, the broker claiming to have procured such a purchaser by the name of H., it appeared to be doubtful whether such a person as H. ever agreed to purchase. As part of the special verdict the court submitted an interrogatory: "Do you find there was such a man as H.?" instead of asking what the fact was in reference to his existence or nonexistence. *Held:*
(1) The jury could not be misled by the form of the question.
(2) The answer "No" meant there was no such man in the transaction. *Ibid.*

3. In an action by a broker for commissions, the evidence, stated in the opinion, is *held* to support findings by the jury that H., an alleged purchaser, was not a purchaser ready, able, and willing to pay the purchase price, and that there was in fact no such person as H. *Ibid.*

BUILDING CONTRACTS. See CONTRACTS, 11–17. DAMAGES, 8–10.

BURDEN OF PROOF. See ARBITRATION AND AWARD, 2. EVIDENCE, 4. HOMICIDE, 1.

BURNING. See ARSON. FIRES.

BY-LAWS. See INSURANCE, 7, 8, 10, 12.

CANCELLATION OF INSTRUMENTS. See DEEDS, 4. LIFE ESTATES, 4, 5.

CANVASS OF ELECTION. See CERTIORARI, 2–4.

CERTIORARI.

1. It is the settled rule in this state that a court, proceeding upon writ of *certiorari*, in giving final judgment can only affirm or reverse the judgment or determination reviewed under the writ. *State ex rel. Nelson v. Emerson*, 292

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2. On *certiorari* to review the acts of inspectors in canvassing the result of an election, no fact not shown or required to be shown by the election record can be considered, the court being confined to the record and debarred from considering extrinsic proof. Hence whether rejected ballots were or were not furnished by the municipal authorities is a question not before the court. *Ibid.*

3. *Certiorari* to review the acts of inspectors in canvassing the result of an election would be ineffective and the writ should be quashed where a reversal of the determination of the inspectors would leave the election uncanvassed and undetermined, while the result as originally certified by the inspectors to the clerk of the municipality would remain in his office unaltered. *Ibid.*

4. Acts of inspectors of elections in rejecting ballots as defective, as well as their subsequent canvass of the result, are ministerial rather than *quasi*-judicial acts and therefore cannot be reviewed on *certiorari*. *Ibid.*

CHATTEL MORTGAGES.

1. A chattel mortgagee, after condition broken, has the legal title to the mortgaged property and the right to the possession thereof. *James Music Co. v. Hankwitz*, 302

2. Under sec. 2313, Stats. (1898), providing for the filing of chattel mortgages and the effect of such filing, the owner of an unfiled chattel mortgage can recover the mortgaged property from a mere trespasser. *Ibid.*

[3. *It seems* that the provisions of sec. 2313, Stats. (1898), are intended only for the protection of those claiming the mortgaged property by purchase, assignment, or otherwise from the mortgagor in possession, and not for the protection of mere trespassers.] *Ibid.*

CLAIMS. See EXECUTORS AND ADMINISTRATORS. MUNICIPAL CORPORATIONS, 19–23.

CLOUD ON TITLE. See LIFE ESTATES, 5. TAX TITLES, 2.

COERCION. See MASTER AND SERVANT, 27, 28.

COMBINATIONS. See CONSPIRACY. HUSBAND AND WIFE, 2–7. LIFE ESTATES.

COMMERCIAL PAPER. See BILLS AND NOTES. BROKERS, 1.

COMMISSION to take deposition. See DISCOVERY, 7, 8.

COMPENSATORY DAMAGES. See INDIANS, 5.

COMPETENCY of witness. See EVIDENCE, 21. WITNESSES, 1, 2.

COMPLAINT. See ACTION. APPEAL, 27. HIGHWAYS, 5, 6. INDICTMENT AND INFORMATION. LIFE ESTATES, 1, 2. MASTER AND SERVANT, 28. PLEADING, 3, 4.

COMPOUND INTEREST. See MORTGAGES, 5.

CONDEMNATION. See EMINENT DOMAIN.

CONDITIONS.
Precedent. See DEEDS, 3–5. INSURANCE, 13, 16. MORTGAGES, 2. PLEADING, 6, 7. RAILROADS, 4. TOWNS, 2. VENDOR AND PURCHASER, 5, 6, 8.
Subsequent. See VENDOR AND PURCHASER, 15.

CONDUCT OF COUNSEL. See APPEAL, 10. TRIAL, 5, 6.

CONSIDERATION. See BILLS AND NOTES, 2. CONTRACTS, 1, 2. DEEDS, 7. DESCENT AND DISTRIBUTION. VENDOR AND PURCHASER, 3.

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CONSPIRACY.

Civil liability. See HUSBAND AND WIFE, 2–7. LIFE ESTATES. MASTER AND SERVANT, 27, 28.

1. There is no such thing as a civil action for conspiracy. An action lies for damages caused by acts pursuant to a formed conspiracy, but none for the conspiracy alone. *Jones v. Monson,* 478

2. In a civil action for damages for an executed conspiracy the gist of the wrong is the damages. The combination may be of no consequence except as bearing upon the rules of evidence. *Ibid.*

Criminal responsibility.

3. The common-law doctrine undisturbed by statute, that a husband and wife by themselves cannot be guilty of a criminal offense when the gist thereof is conspiracy, does not go to the extent of exempting the wife from the consequences of criminal acts in execution of a conspiracy jointly with her husband which are of themselves subjects of criminal prosecution. *Jones v. Monson,* 478

CONSTITUTIONAL LAW.

Private or local law.

Assuming that ch. 292, Laws of 1880, is private or local, it is not invalid on the ground that the subject of the act is not expressed in its title (sec. 18, art. IV, Const.). *Wisconsin River Imp. Co. v. Pier,* 325

Legislative powers and delegation thereof. See RAILROADS, 1–4.

Personal rights. See CRIMINAL LAW, 7.

Limitation on indebtedness. See MUNICIPAL CORPORATIONS, 14–16.

CONSTRUCTIVE NOTICE. See DEEDS, 7.

CONTINGENT CLAIMS. See EXECUTORS AND ADMINISTRATORS, 2.

CONTINUANCE. See PLEADING, 10.

CONTINUING OFFER. See CONTRACTS, 2–5.

CONTRACTS.

Requisites and validity. See BILLS AND NOTES. BROKERS. INSURANCE, 1–6. MUNICIPAL CORPORATIONS, 9. SEALS. VENDOR AND PURCHASER, 1–8.

Same: Validity of assent. See MASTER AND SERVANT, 1.

Same: Continuing offer: Mutuality: Revocation.

1. Consideration in the form of mutuality being essential to the validity of a contract, a wholly executory contract for mutual acts is of no binding force upon one party unless and until the other has become bound thereby. *Hopkins v. Racine M. & W. I. Co.* 583

2. Such rule is subject to modification to the extent that an executory promise by one party may be considered a continuing offer of performance, which, when accepted, in whole or in part, by the other party, becomes a contract *pro tanto* to the extent of the acceptance. *Ibid.*

3. Such modification, however, is carried no further than to bind the offerer so long as he sees fit to keep the offer open. *Ibid.*

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4. A continuing offer may be revoked at any time except as to acceptance thereunder prior to the revocation. *Ibid.*

5. After the revocation of a continuing offer, no damage accrues to the offeree for refusal to comply with subsequent acceptances. *Ibid.*

Same: Proposal and acceptance: Contracts by correspondence: Meeting of minds.

6. A contract claimed to arise from an offer and acceptance in letters is to be interpreted and applied in the light of the facts as understood by the parties, and when the minds of the parties to the transaction did not come to an agreement on the subject of the interest in the property to be embraced in the contract, no contract resulted. *F. G. Hood & Co. v. Girard L. Co.* 152

Legality of object and of consideration. See INSURANCE, 2–6.

Construction: Ambiguity: Parol evidence.

7. Taking all of the provisions of a contract together, and in connection with the significant, and apparently deliberate, omission of the place to which shipments were to be made, the contract is *held* uncertain on its face. *Jung B. Co. v. Konrad,* 107

8. In that situation, evidence of the situation and surroundings of the parties as well as their communications, so far as such communications threw light upon the situation, were competent to be received in order that the court might read the contract in the same light as the parties did when they made it. *Ibid.*

9. The meaning of the parties and the proper construction of uncertain terms of a written contract is for the jury. *Ibid.*

10. In such case the parol evidence admitted on the trial is *held* to be sufficient to show that shipping orders were to precede shipments. *Ibid.*

Building contracts: Architects. See DAMAGES, 8–10.

11. An architect, as the mutual agent of builder and proprietor to construe plans for a structure and settle disputes in that regard, has no authority to change the plans. *Foeller v. Heintz,* 169

12. The rules permitting a builder to recover upon an entire building contract, only substantially performed, less damages for incompleteness, apply to an entire contract for supervision of the execution by an architect. *Ibid.*

13. If a builder, by inexcusable fault of the supervising and directing architect, departs from the plans agreed upon, the damages may be charged to the architect. *Ibid.*

Same: Substantial performance.

14. To constitute substantial execution of a building contract, or one to supervise and direct the construction of a building according to specific plans and with the usual architect's duty in such cases, the structure as completed must be the result of good-faith efforts to strictly perform and must satisfy with exactness all essentials to the accomplishment of the proprietor's purpose. *Foeller v. Heintz,* 169

15. The test of substantial performance is not inconsistent with imperfections in matters of detail, not defeating the object of the proprietor by going to the root of the matter, yet requiring a considerable outlay to afford him, for a given amount of money, in substance the thing agreed upon. *Ibid.*

16. Substantial performance is consistent with there being incompleteness in matters of detail, some of which are practicably

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structurally remediable and others not so, in the aggregate requiring a considerable sum of money. *Ibid.*

17. Incompleteness consistent with substantial performance can be remedied, structurally, practicably, and reasonably, that is, without an expenditure of an unreasonable sum of money, when the element of incompleteness can be obviated without destruction of any material part of the building erected according to contract. *Ibid.*

Entire contracts. See CONTRACTS, 12–17. DAMAGES, 8–10.

Executory contracts. See CONTRACTS, 1, 19–21. SALES, 1, 2.

Modification. See PLEADING, 14, 15. SALES, 3.

Rescission. See INSURANCE, 7–12. VENDOR AND PURCHASER, 9, 10, 15.

Performance or breach. See DAMAGES, 2–4. ELECTION OF REMEDIES. INSURANCE, 7–12. LOGS AND LOGGING, 1. PLEADING, 13, 14. SALES, 4, 5. VENDOR AND PURCHASER, 9, 10.

Same: Waiver.

18. In an action for breach of contract to deliver a quantity of malt, the evidence, stated in the opinion, is *held* to justify a finding that plaintiff, the purchaser, by its acts and conduct had, at the time the seller refused further performance, evinced an intention no longer to be bound by the contract. *Jung Brewing Co. v. Konrad,* 107

19. There may be a breach of an executory contract by deliberate refusal to perform stipulations upon which the obligation of the other party depends, and, when such breach takes place, the other party has a right to treat the contract as wholly terminated and take measures accordingly. *Ibid.*

20. In such situation, if the other party does not treat the contract as terminated, but continues to demand performance, he will be held to have kept the contract alive. He cannot treat the repudiation of the contract as a breach and as no breach at the same time. *Ibid.*

21. Where, after a buyer had repudiated a contract for the delivery of malt, the seller neither did nor said anything indicating that he expected or demanded performance of the contract, he cannot be said to have treated, or waived his right to treat, the repudiation as a breach. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See ELECTRICITY. FIRES, 3, 4. MASTER AND SERVANT, 4, 10, 14–20. MUNICIPAL CORPORATIONS 17 18. NEGLIGENCE, 1–4. RAILROADS, 5–11, 13, 14.

CORPORATIONS.

Incorporation and organization. See NAVIGABLE WATERS, 1.

Same: Presumptions.

1. Where the charter of a corporation is not in evidence and no special charter is shown, it will be presumed that it was organized under the general incorporation statutes. *Wisconsin River Imp. Co. v. Pier,* 325

Same: Amendment of articles: Railroads.

2. Sec. 1774, Stats. (1898), relative to amending articles of incorporation, refers only to corporations organized under ch. 86, Stats. (1898), which excludes railroad corporations. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Commission,* 80

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3. A change of the authorized capital stock of a railway corporation is one of a fundamental character requiring an amendment to the articles of organization. *Ibid.*

4. Such a change under sec. 1826, Stats. (1898), though not called an amendment, when effected is one in fact. *Ibid.*

5. When by the policy of the written law the articles of organization of a corporation are required to be made a matter of public record and there is no express provision for making an amendment to such articles a like matter, by necessary implication such amendment, to be valid, must substantially follow, as regards publicity, the course of the original articles. *Ibid.*

6. Notwithstanding the written law makes no express provision for making a change in the fundamentals of a corporation a matter of public record, the provision in sec. 1820, Stats. (1898), to the effect that such a corporation shall pay a prescribed fee for filing amendments to its articles of organization, recognizes that such filing is essential to the validity of such an amendment, and in view of the unwritten law in respect to the matter is equivalent to a legislative declaration in harmony therewith. *Ibid.*

Capital stock. See CORPORATIONS, 3, 4.

Members and stockholders: Suing or defending on behalf of corporation. See EQUITY, 1.

Officers and agents: Authority and functions. See BILLS AND NOTES, 6. ESTOPPEL, 1–4. INSURANCE, 1–6.

By-laws. See INSURANCE, 7, 8, 10, 12.

Public-service corporations. See EMINENT DOMAIN. RAILROADS, 1. TAXATION, 1.

Foreign corporations. See PROCESS, 1.

COSTS. See APPEAL, 12. INTOXICATING LIQUORS, 4. MORTGAGES, 10–12. PLEADING, 11. WILLS, 1–3.

COUNTERCLAIM. See PLEADING, 14–17.

COUNTY BOARD. See TOWNS.

COUNTY JUDGES. See JUDGES. OFFICERS.

COURTS.

Jurisdiction. See INDIANS. WILLS, 1–3.

Courts of limited jurisdiction: Superior court of Lincoln county.

1. Under ch. 295, Laws of 1905, relating to the superior court of Lincoln county, *held:*

(1) The words "actions and proceedings" together cover all remedies to be obtained in courts.

(2) The words "at law or in equity" embrace all exercise of judicial or *quasi*-judicial power on the part of courts, whether the power be conferred upon courts by statute, common law, or equitable rules.

(3) The power conferred upon the circuit court or the judge thereof by ch. 292, Laws of 1880, is under ch. 295, Laws of 1905, conferred upon the superior court of Lincoln county and upon its judge. *Wisconsin River Imp. Co. v. Pier,* 325

United States courts. See BANKRUPTCY, 13, 14.

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Terms of court: Powers of court after expiration of term.

2. Under sec. 2424, Stats. (1898), as amended by ch. 6, Laws of 1905, where the June term in I. county was succeeded by a term commencing the first Wednesday in November, and the September term in A. county was succeeded by a term commencing the second Monday in April, and the September term in A. county was also a special term for I. county, an order entered in A. county on October 16, vacating a judgment entered in I. county in the preceding August, is an order made at the same term at which judgment was entered. *Frost v. Meyer*, 255

3. The mere fact that such order was filed with the clerk after the expiration of the term did not make it an order after the term. *Ibid.*

4. In such case a recital in the order that it was made at a general term for A. county, which was a special term for I. county "begun and held on the 16th day of October," is *held* to have had reference to the time the order was made and not to the time of the commencement of the term. *Ibid.*

Same: Subsequent term.

5. A court at a subsequent term may correct a judgment or order on account of a clerical error or mistake in matter of form in the entry. *Ibid.*

COVERTURE. See HUSBAND AND WIFE, 1.

CREDIBILITY. See WITNESSES, 4.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See ARSON. CONSPIRACY, 3. EMBEZZLEMENT. HOMICIDE. INTOXICATING LIQUORS, 1–3. STATUTES, 4, 5.

1. One cannot be said to wilfully violate a statute which is so contradictory or blind that he must guess or conjecture what his duty is thereunder. *Brown v. State*, 543

2. An act, in order to be wilfully criminal, must fall both within the words of the denunciatory statute and within its spirit. *Ibid.*

3. Under ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), and under the evidence, stated in the opinion, it is *held* that defendant was not shown to have wilfully failed and neglected to obey the command of the statute. *Ibid.*

4. "Wilfully," when used to describe acts which shall be punished criminally, includes, in addition to mere purpose to do the act, a purpose to do wrong, and involves evil intent or legal malice. *Ibid.*

5. "Wilfully," in the Wisconsin criminal statutes, is satisfied only by evil intent without justifiable excuse, and is used to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty. *Ibid.*

6. Ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), denounces a penalty upon any physician who wilfully refuses to make a certificate of birth in a prescribed form within five days after the date of birth. Defendant, a physician, is *held* not guilty of wilful violation of the law of 1907, but of a mere inadvertent omission of a required act in the sincere attempt to perform a duty as understood. *Ibid.*

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[7. Whether ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), is an invasion of the constitutional rights of the individual, not determined.] *Ibid.*

Trial: Instructions.

8. An instruction that the jury might not convict of a criminal offense unless upon all the evidence, or want of evidence, the accused's guilt is established beyond a reasonable doubt, is error, unless cured in other portions of the charge. *Dillon v. State,* 655

Appeal and error: Writ of error before judgment.

9. The proceedings under sec. 4719, Stats. (1898), differ from the course of reviewing a motion for a new trial upon the court's minutes under sec. 4724; hence a motion to set aside a verdict and grant a new trial upon the minutes of the court upon the grounds that the verdict was contrary to law, against the evidence and not supported thereby, and also upon the ground that the verdict was perverse and did not do substantial justice to the defendant, presents no grounds under sec. 4719 for the issuance of a writ of error before judgment to review the order refusing defendant a new trial. *Lovesee v. State,* 94

Same: Writ of error: Amendment.

10. In a criminal cause the fact that no judgment has been entered is of itself no sufficient ground for refusing to consider a writ of error, for the supreme court has power to amend the writ so as to permit a review of proper orders. *Lovesee v. State,* 94

Same: Notice of appeal: Mistake in title of action.

11. Sec. 4761, Stats. (1898), providing for appeals in criminal cases from justices' courts, which by sec. 2, ch. 190, Laws of 1889, governs the police court of the city of Neillsville, provides that the appellant shall "*give* said justice *notice thereof in writing* within twenty-four hours." In an action in such police court the defendant was convicted of the violation of a city ordinance and by mistake entitled the action in his notice of appeal as "State of Wisconsin," plaintiff, instead of "City of Neillsville." *Held,* that the call of the statute was satisfied notwithstanding the erroneous title. *Cowles v. Neillsville,* 384

CROSSINGS. See RAILROADS, 5–10.

CUSTOM AND USAGE. See TRIAL, 2.

DAMAGES.

Grounds and subjects of compensatory damages. See CONSPIRACY, 1, 2. CONTRACTS, 5, 13. HIGHWAYS, 1, 2. INDIANS, 5. SALES, 5.

Same: Remote and speculative damages. See EMINENT DOMAIN, 3, 4.

Damnum absque injuria. See HUSBAND AND WIFE, 6.

Exemplary damages. See INDIANS, 5.

1. Where no punitory damages were awarded by the jury, error in the manner of submitting the question of such damages to the jury was not prejudicial to appellant. *Jones v. Monson,* 478

Measure of damages. See DAMAGES, 8–10. EMINENT DOMAIN. LOGS AND LOGGING, 2. MORTGAGES, 3, 4.

2. Damages for breach of contract, under ordinary circumstances, are limited to such as may be considered to arise according to the usual course of things from such breach and so must be re-

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garded, reasonably, as having been in contemplation by the parties at the time of making the contract as the probable result of the breach of it, or, in the case of special circumstances, such as may reasonably be supposed to have been in such contemplation in view thereof so far as such special circumstances were known to the parties at the time of making the contract. *Anderson v. Savoy,* 44

3. Under a contract for the sale of 400 tons of ice it is *held,* under the evidence, stated in the opinion, that there were no special circumstances to be dealt with in determining the damages to which plaintiff was entitled. *Ibid.*

4. In such case the true measure of damages as to the ice not delivered is the difference between what the ice would have cost the plaintiff under the contract when he should have received the same and the fair market value at such time, with interest thereon, in case ice was reasonably obtainable in the market; otherwise the difference between the cost and what ice would have been actually worth to him when he ought to have received it. *Ibid.*

5. In an action to recover damages by fire to standing timber, where the evidence as to damages was not very satisfactory, it is *held* that there was no positive error in rulings on the admission of evidence, nor in instructing the jury that in assessing damages they should be fair and just and fix such sum as would compensate the plaintiff for the injury which the preponderance of the evidence established that he actually sustained solely as the result of defendants' negligence. *Miller v. Neale,* 426

6. The true measure of damages when standing timber is destroyed by fire seems to be the diminution in the value of the land caused by the injury to the timber. *Ibid.*

7. Where standing timber is destroyed by fire it is not error to admit proof of the damage to the timber itself. While such proof does not determine the measure of the damages, it is entirely legitimate proof and entitled to be considered by the jury in fixing the diminished value of the land. *Ibid.*

Same: Building contracts.

8. The rule of damages by which to measure the proprietor's loss in case of substantial performance only of a building contract, is the reasonable cost of remedying the defects which can be practicably remedied so as to make the structure exactly conform to the agreement, and the difference between the value of the structure so completed and one like the building agreed upon. On this subject a mistake in *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 133, pointed out and corrected. *Foeller v. Heintz.* 169

9. The judicial rule grounded in equity permitting recovery upon an entire building contract, but substantially performed, aims to give the proprietor, in substance, and as near as practicable, the very thing contracted for; not merely in value, but in form and character. *Ibid.*

10. In case of good-faith efforts to perform an entire building contract, resulting in a structure satisfying all essentials to the substantial purpose of the proprietor in making the agreement, he is obligated to pay upon the agreement the entire contract price, subject to deductions for incompleteness as stated in the

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foregoing, the fact that the structure as completed is of as great or even of greater market value than the one called for not being controlling. *Ibid.*

Excessive damages.

11. In an action by a servant for personal injury, an award of $5,000 damages, while high, is *held* not to be so excessive as to indicate either passion or prejudice on the part of the jury. *Wankowski v. Crivitz P. & P. Co.* 123

12. In an action for personal injuries by collision with an automobile, upon the evidence, stated in the opinion, it is *held* that a verdict for $1,200 damages was not excessive. *Hiroux v. Baum,* 197

DAMNUM ABSQUE INJURIA. See HUSBAND AND WIFE, 6.

DAMS. See NAVIGABLE WATERS, 1, 4–8, 10, 11.

DAYS. See OFFICERS.

DEBTOR AND CREDITOR. See ASSIGNMENTS. BANKRUPTCY. EVIDENCE, 9, 10. FRAUDULENT CONVEYANCES. GARNISHMENT. LIMITATION OF ACTIONS, 3. TENDER.

DECLARATION OF TRUST. See TRUSTS AND TRUSTEES, 1, 2.

DECLARATIONS. See EVIDENCE, 5. HUSBAND AND WIFE, 9. WITNESSES, 2.

DEEDS.

Requisites and validity. See TRUSTS AND TRUSTEES.

Same: Delivery. See LIFE ESTATES, 3.

1. Evidence that a deed, signed by the grantor on the day of her death, accompanied by directions to her husband to deliver it to the grantee, followed by a manual delivery after the grantor's death, upholds findings that the deed was in fact delivered. *Schumacher v. Draeger,* 618

Same: Escrow.

2. It is the intent to pass title which makes the delivery of a deed effective, although mere mental reservation on the part of the grantor cannot affect that question. *Zoerb v. Paetz,* 59

3. Where an agreement, as understood by both parties, is that delivery of a deed is not to be made nor title pass until conditions, precedent or concurrent, are performed, a mere manual tradition of the deed under the mistaken supposition that these prerequisites had been fulfilled, when in fact they had not, will not pass title irrevocably. *Ibid.*

4. Where neither party to an attempted transfer of title to lands had definite knowledge of the character of the papers or agreements necessary to carry out their understanding, but mutually relied upon the scrivener to decide that question and prepare the papers, the intention of the scrivener as to the papers necessary to complete the transaction is in legal effect the intention of the parties, and his forgetfulness and consequent mistake in handing over a deed before a material part of the transaction had been performed is the forgetfulness and mistake of both parties, for the correction of which a court of equity will afford relief by cancellation of the deed. *Ibid.*

5. The delivery of a fully executed deed to the scrivener, who drew the necessary papers to carry out the agreement of the parties, with oral direction to deliver the same to the purchaser when

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his wife had joined in a bond and mortgage, does not constitute a valid delivery in escrow. *Ibid.*

6. In such case, even if there could be a valid escrow, it was ineffectual in the absence of a valid written agreement to convey the land, such as would satisfy the statute of frauds, deposited with the deed. *Ibid.*

Recording and registration: Constructive notice.

7. The record of a deed by a third person to the children of a judgment debtor is not of itself constructive notice to the judgment creditor of its fraudulent character or that the judgment debtor was an interested party to the conveyance. *Foote v. Harrison,* 588

Pleading and evidence. See EVIDENCE, 4.

DEFECT OF PARTIES. See APPEAL, 11.

DELEGATION OF AUTHORITY. See RAILROADS, 1–4. TOWNS, 3.

DELIVERY. See BILLS AND NOTES, 1. DEEDS, 1–6. LIFE ESTATES, 3.

DEMURRER. See ACTION, 2. APPEAL, 11, 12, 14, 27. INDICTMENT AND INFORMATION. INJUNCTION, 1. PARTIES. PLEADING, 7, 8. SALES, 1. TOWNS, 4.

DEPOSITIONS. See DISCOVERY.

DESCENT AND DISTRIBUTION.

Persons entitled: Divorced wife.

1. A wife who has obtained a divorce has no interest in the estate of her deceased husband so long as the judgment awarding her a final division and distribution of her husband's property stands unimpeached. *Uecker v. Thiedt,* 634

Rights and liabilities of heirs and distributees.

2. The owner of real estate, as against the heir, may convey it to another as a gift without consideration. *Schumacher v. Draeger,* 618

DEVISEES. See WILLS, 7–13.

DISABILITY. See HUSBAND AND WIFE, 1.

DISCOVERY.

Under sec. 4096.

1. Where a plaintiff proceeds to examine the defendant under sec. 4096, Stats. (1898), for the purpose of framing a complaint, it is not required that plaintiff should set out in the required affidavit facts sufficient to constitute a cause of action. *Gratz v. Parker,* 104

2. In such case it is not even necessary that the plaintiff should know that a cause of action exists, and the examination may be had even though the affidavit shows affirmatively that the plaintiff does not know. *Ibid.*

3. In such case, while it may be customary to state in the affidavit that the facts upon which discovery is sought are not within the knowledge of the plaintiff, such statement is not essential, and its omission does not render the affidavit defective. *Ibid.*

4. In proceedings under sec. 4096, Stats. (1898), for the examination of a party before issue joined, the court is not concluded by the required affidavit as to what is necessary to enable the moving party to plead. *Badger Brass Mfg. Co. v. Daly,* 601

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5. In proceedings under sec. 4096, Stats. (1898), taken before issue joined, the limiting of the examination so as to prevent any examination under any or either of the points set forth in the required affidavit, stated in the opinion, is *held* to show no abuse of discretion. *Ibid.*

Same: Examination in foreign country.

6. A party residing in a foreign country is "without the state" and within the calls of sec. 4096, Stats. (1898), authorizing the examination of a party otherwise than as a witness at the trial, and providing that his deposition in that behalf may be taken without the state. *Hite v. Keene,* 625

7. The provisions of sec. 4096, Stats. (1898), requiring depositions thereunder without the state to be taken in the same manner that other depositions are taken, as applied to such depositions taken in a foreign country, contemplate depositions taken either on oral interrogatories or by commission. *Ibid.*

8. The general provisions of secs. 4113, 4114, Stats. (1898), requiring depositions taken by commission to be on written interrogatories, do not override the special provisions of sec. 4096, permitting the party whose deposition is taken thereunder to be examined on oral interrogatories. *Ibid.*

9. It is within the discretion of the trial court to issue letters rogatory to a foreign court or tribunal in aid of an examination, under sec. 4096, Stats. (1898), of a party residing in a foreign country. *Ibid.*

DISCRETION. See ATTORNEY AND CLIENT, 3. DISCOVERY, 5. DISMISSAL AND NONSUIT, 3. HOMICIDE, 1. INJUNCTION, 1. JUDGMENT, 2. MANDAMUS, 3. PLEADING, 11. TRIAL, 1. WILLS, 1, 2.

DISMISSAL AND NONSUIT.

Voluntary: Rights of adverse party.

1. The right to a judgment on the verdict or to appeal from a denial thereof having become fixed by the verdict, it cannot rightly be taken away by a voluntary discontinuance. *Anderson v. Horlick's Malted Milk Co.* 569

2. A new trial having been granted, even if the right to discontinue the action is thereby revived, such right is not absolute, but requires the assent of the court. *Ibid.*

3. Where as the result of a full trial a party, on the face of the record, is entitled to judgment, and a stay of proceedings has been granted to give reasonable opportunity for the preparation and service of appeal papers, the opposite party and the court having full notice that it is intended in good faith to take an appeal, judicial assent to a discontinuance sought with the evident purpose of superseding the right of appeal should be withheld. *Ibid.*

Same: Effect.

4. The legal effect of an order that "the action be and is hereby dismissed without costs to either party," is to terminate the action. *Wawrzyniakowski v. Hoffman & Billings Mfg. Co.* 629

Involuntary: Effect. See ATTORNEY AND CLIENT, 1, 3. JUDGMENT, 3.

5. A judgment of dismissal, "without prejudice to the plaintiff's right to bring another action," of an action regularly before the circuit court on appeal from a justice's judgment (whether

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the order of dismissal was regular or not), left no judgment in the justice's court, and constituted no bar to a subsequent action. *Holman v. Lueck,* 375

6. Such judgment of dismissal, if erroneous, constituted error within the jurisdiction of the circuit court. *Ibid.*

DIVORCE. See DESCENT AND DISTRIBUTION.

DWELLING HOUSE. See ARSON.

EJECTMENT. See NEW TRIAL, 1.

ELECTION OF REMEDIES.

1. Election to take advantage of a breach of a contract must be promptly made. *Voss v. Northwestern Nat. L. Ins. Co.* 492

2. Such rule is peculiarly applicable to mutual insurance contracts, where the insured practically is on both sides of the contract, as insurer and insured. *Ibid.*

ELECTIONS. See CERTIORARI, 2–4.

ELECTRICITY.

Where, in an action for personal injuries, it appeared without dispute that plaintiff, twenty-five years of age, knew he was taking hold of a live electric wire heavily charged, had before him actual demonstration of its condition, and yet intentionally and unnecessarily but from good motives grasped the wire, assuming, without real knowledge, to know that he would be protected by the insulating cover upon the wire, he is guilty of a slight want of ordinary care which contributed to his injury. *Billington v. Eastern Wis. R. & L. Co.* 416

ELECTRIC RAILWAY. See EMINENT DOMAIN. EVIDENCE, 18–20.

EMBEZZLEMENT.

1. In a criminal prosecution for embezzlement the evidence, stated in the opinion, is *held* sufficient to warrant a conviction. *Guenther v. State,* 183

2. Where an employee made sales on credit, instructions as to the ownership of the debts thereby created and the circumstances under which the employee would have been guilty of embezzlement for misappropriation of the moneys when collected, even if erroneous, are not prejudicial, when the proceeds of such sales or credit accounts are not included in the amount found by the jury to have been embezzled by the employee. *Ibid.*

3. Where a crime is committed by the complete embezzlement of moneys, the guilty person is none the less liable to the owner for the moneys so embezzled, and payment thereof or settlement therefor by a note does not expunge or contradict the guilt of the already completed embezzlement. *Ibid.*

4. In such case instructions relating to the significance of the acts of the employer in retaining a promissory note to cover the shortage are immaterial to the result of a criminal prosecution. *Ibid.*

5. In a criminal prosecution for embezzlement, evidence of a statement to the defendant, an employee, that his employer "doesn't want his men to be living in poverty, so if you need a little

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money,—at first you may need some of the money used for sales and pay it back when you are able," is *held*, at the most, to authorize trifling application of moneys for current living expenses anticipatory of the $40 monthly salary to be allowed defendant, and not to authorize expenditures of about $600 in the repair of defendant's residence. *Ibid.*

EMINENT DOMAIN.

Nature, extent, and delegation of power. See NAVIGABLE WATERS.

Compensation: Measure and amount: Evidence. See EVIDENCE, 18-20.

1. In proceedings to condemn a right of way for an electric railroad, evidence showing that the defendant railroad was connected with and had traffic arrangements with commercial railroads, of the probable location of its freight yards and their proximity to such other railroads, and what under its charter were its powers and privileges as to its right to use motive power other than electric in its use of the strip of land sought to be condemned, is admissible to show what use the defendant might make of this strip. *Pierce v. Chicago & Milwaukee E. R. Co.* 550
2. In proceedings to condemn a right of way for an electric railroad, the nature of the use of the strip sought to be condemned is material on the question of damages to the landowner's adjoining property, if it appears that a particular use would naturally tend to depreciate its market value. *Ibid.*
3. In proceedings to condemn a right of way for an electric railroad, items of evidence of the cost of replacing sheds and fences taken as part of the strip, and of the danger to life and property consequent upon a railroad farm crossing, are not in themselves elements for which damages can properly be allowed as items of injury to the adjoining land, and in arriving at the damages are to be rejected as too remote and conjectural as causes of depreciation. *Ibid.*
4. In such case, under positive directions and instructions, stated in the opinion, it is presumed that the jury understood that they were not to assess any special damages on account of conjectural or remote conditions, and that they followed such explicit instructions in arriving at their verdict. *Ibid.*

Same: Instructions to jury.

5. In proceedings to condemn a right of way for an electric railroad, instructions to the jury informing them that evidence that the defendant's railroad was connected with and had traffic arrangements with commercial railroads, of the probable location of its freight yards and their proximity to such other railroads, and what under its charter were its powers and privileges as to its right to use motive power other than electric in its use of the strip of land sought to be condemned, could only be considered on the question of the market value of the land not taken, are *held* appropriate and sufficient to inform the jury of its duty in considering such evidence. *Pierce v. Chicago & Milwaukee E. R. Co.* 550
6. In proceedings to condemn lands for an electric railroad, portions of instructions to the jury excepted to, stated in the opinion, which were only parts of sentences or paragraphs embracing one subject and which should be considered in connection

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with the other parts, are *held* not to be subject to the claim that they conveyed the idea that the jury were not to take into consideration any enhanced value of plaintiff's lands at the time of taking by reason of the probable construction of the road. *Ibid.*

7. In proceedings to condemn land for an electric railroad, instructions to the jury, stated in the opinion, are *held* to embody the rule applicable to the situation, correctly embrace the elements of the case bearing on the question at issue, and to sufficiently cover defendant's requests on that subject. *Ibid.*

8. In proceedings to condemn land for an electric railroad, refusals to instruct and the instructions given which pertained to duplication of damages, the defining of fair market values, the value of the strip actually taken, the materiality of sales of other property in connection with opinion evidence of witnesses as to market value, the opinions of witnesses as to the damages to the remainder of the land based on the depreciation of the market value of the whole, the adaptability of the remainder of the land for platting because of the railroad crossing, and its availability for present and immediate uses, are *held* not to have been erroneous. *Ibid.*

9. In proceedings to condemn lands for an electric railroad, instructions to the jury that they were not to agree in advance to add the values as fixed by the various witnesses, to divide the total by the number of witnesses, and to adopt the result as the true value, but that they were "to consider all credible evidence, facts, and circumstances in the case, and therefrom find and determine the fair market value of the land taken and the depreciation, if any, to the fair market value of the land not taken," are *held* to be an appropriate and correct submission, and not open to the objection that thereby the court informed the jury that they could take an average of the fair market values testified to by the various witnesses as the actual market values of the property involved. *Ibid.*

ENGLISH LANGUAGE. See NEWSPAPERS, 2.

ENTICING OF WIFE. See HUSBAND AND WIFE, 2–9.

ENTIRE CONTRACTS. See CONTRACTS, 12–17. DAMAGES, 8–10.

EQUITABLE LIEN. See APPEAL, 28. SPECIFIC PERFORMANCE, 2, 3.

EQUITY.

Jurisdiction. See ACTION. APPEAL, 9. DEEDS, 4. HIGHWAYS, 2, 3. LIFE ESTATES. MUNICIPAL CORPORATIONS, 7, 8. SUBROGATION, 2, 3. TENDER, 1.

Enforcement of legal rights.

1. Although the right of a member of a corporation to invoke the interference of a court of equity to practically coerce the corporation to enforce its legal rights against its officers exists, equitable considerations guide and control in granting or withholding relief. *Dorner v. School District,* 147

2. A court will not coerce the enforcement of a strict legal right, however clear, if thereby injustice and inequity will be done. *Ibid.*

Laches. See ELECTION OF REMEDIES.

3. A court of equity may and should refuse to upset consummated and contemplated transactions to the hurt of those who have

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acted in good faith at the suit of a plaintiff who, by laches or failure to protest upon opportunity before the acts were done, has induced or justified belief that he acquiesced in and approved the acts. *Dorner v. School District,* 147

4. Equity discourages stale demands and will not aid one who has been guilty of gross laches. *Foote v. Harrison,* 588

5. The rule of laches is applied by a court of equity according to its ideas of right and justice and independently of any prescribed period of time, the reasonableness of the time depending upon the facts and circumstances of each particular case. *Ibid.*

ESCROW. See DEEDS, 2–6.

ESTOPPEL.

Equitable estoppel: Persons affected. See INSURANCE, 9, 11. MUNICIPAL CORPORATIONS, 8, 9. SCHOOLS AND SCHOOL DISTRICTS, 1. WAIVER, 2.

1. One who knows that the officer or agent of a corporation with whom he is dealing habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the corporate business, has a right to assume that such officer or agent is acting within the scope of his authority. *Curtis L. & L. Co. v. Interior L. Co.* 341

2. A corporation is estopped from denying that its agents possess all the authority which it gives them the appearance of having. *Ibid.*

3. A corporation is estopped from denying that its general officer has the powers which it has customarily allowed him to exercise. *Ibid.*

4. Where the secretary and treasurer of a corporation is clothed with apparent authority to do acts which he does, his acts are binding on the corporation. *Ibid.*

Same: Pleading.

5. While estoppel, as a general rule, must be pleaded, if the facts showing the estoppel are within the issues made by the pleadings, and the evidence showing the estoppel is admissible for any purpose thereunder, it is not necessary that the estoppel should be specially pleaded. *Lawton v. Racine,* 593

EVIDENCE.

Presumptions.

1. The existence of a personal relation or a state of things being once established by proof, the presumption is that such relation or state of things continues to exist as before until the contrary is shown or until a different presumption is raised from the nature of the subject in question. *Hilliard v. Wisconsin Life Ins. Co.* 208

2. The foregoing rule applies to an established condition as to life and matrimonial relations. *Ibid.*

3. In the absence of proof to the contrary, the presumption exists that a government survey shows the correct acreage of a particular forty. *Curtis L. & L. Co. v. Interior L. Co.* 341

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Burden of proof. See ARBITRATION AND AWARD, 2. HOMICIDE, 1.

4. In an action to set aside a deed for fraud or undue influence the burden of proof is upon the plaintiff. *Schumacher v. Draeger,* 618

Relevancy, materiality, and competency. See CONTRACTS, 8. DAMAGES, 8–10. EMINENT DOMAIN, 1–5. LOGS AND LOGGING, 1. TRIAL, 2.

Same: Res gestæ.

5. In an action to recover damages resulting to plaintiff's standing timber by reason of a fire alleged to have been negligently set on defendants' land by their servant, declarations of the servant made in connection with and throwing light upon his acts in starting the fire are *held* admissible as part of the *res gestæ. Miller v. Neale,* 426

Affirmative and negative evidence.

6. Evidence merely negative in form, in contradiction of positive evidence, does not call for explanation to the jury as regards its definition or comparative weight. *Anderson v. Horlick's Malted Milk Co.* 569

7. Where the evidence upon the negative takes the form of recollection and positive denial based thereon, it is affirmative, in effect, rather than negative, under the rule for comparative weight of the two classes of evidence, notwithstanding its negative form. *Ibid.*

8. In an action for personal injuries, the controversy being as to whether a bell or other signal was sounded or not, there being positive evidence that it did, and a witness having testified that he did not hear the bell or signal sounded, a situation is presented calling for instructions on the question of positive and negative evidence and their comparative weight. *Ibid.*

Admissions: Account stated. See APPEAL, 21.

9. Where a demand in the form of a bill or account is delivered to a debtor his conduct with reference thereto may be significant, and his failure to object within a reasonable time be construed *prima facie* as an admission that such bill or account is correct. *Jones v. De Muth,* 120

10. Such failure to object is not at all conclusive either on the fact of admission or on the fact of correctness, but is *prima facie,* subject to be overcome by other evidence. *Ibid.*

Declarations. See EVIDENCE, 5. HUSBAND AND WIFE, 9. WITNESSES, 2.

Documentary evidence: Books of account.

11. Under sec. 4186, Stats. (1898), relating to admission in evidence of books of account, absence of any evidence "that such entries are just, to the best of his [witness's] knowledge and belief," renders the entries in the books inadmissible. *Jones v. De Muth,* 120

12. On the trial of a claim consisting of two items of $150 each for money loaned, filed against a decedent's estate, the claimant's books of account, verified under the calls of sec. 4186, Stats. (1898), are properly excluded, since the items fall within the exception of sec. 4187, excluding entries of items of money delivered at one time exceeding $5. *Dohmen v. Estate of Blum,* 560

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13. In such case, by reason of the statute rendering the plaintiff incompetent to testify to transactions or communications personally had with the decedent, plaintiff could not use the books as memoranda to refresh his memory and then testify to the transactions. *Ibid.*

14. Neither were such books admissible under sec. 4189, Stats. (1898), since that section refers to entries made in a book not strictly a book of account, and the books were identified as belonging to the class mentioned in sec. 4186, and produced by a party to the cause in his own behalf. *Ibid.*

15. In such case, even if one cash item was represented by a written order drawn upon another party indebted to the plaintiff, which was given to the deceased and cashed by him, it is but another method of delivering money to the deceased and within the exception of sec. 4187, Stats. (1898). *Ibid.*

[16. Whether the books of account mentioned in sec. 4186, Stats. (1898), properly verified, would in any case be evidence of a loan of money as a separate transaction, not determined.] *Ibid.*

Parol or extrinsic evidence affecting writings. See BILLS AND NOTES, 1. CONTRACTS, 8–10. MUNICIPAL CORPORATIONS, 3.

17. Under a written contract to convey the SW SW 6–35–8 in a certain county of this state at a specified price per acre, the unit upon which the price was made and accepted is the acre, and there is no such ambiguity in the writings as would admit parol testimony to vary the terms of the written agreement. *Curtis L. & L. Co. v. Interior L. Co.* 341

Opinion evidence: Subjects of expert testimony. See TRIAL, 4.

18. In proceedings to condemn lands for an electric railroad, a hypothetical question as to values, stated in the opinion, is *held* not to embrace improper items of evidence, to contain sufficient facts to enable the witness to form an opinion, and not to be misleading or confusing. *Pierce v. Chicago & Milwaukee E. R. Co.* 550

19. In proceedings to condemn lands for an electric railroad, where a witness had fully testified on the questions of the adaptability of the lands, a farm, for platting and how to plat it after the taking of the strip for railroad purposes, it is not prejudicial error to sustain an objection to a question: "Would you, as a real-estate man, advise the owner of the farm to cut it into acre tracts and sell them off on Asylum avenue?" since an answer to the question would at most be expressive of the witness's opinion or advice regarding the advisability of platting and cutting off acre tracts on Asylum avenue. *Ibid.*

20. If such question was designed to elicit an answer respecting the market value of the land in acre lots, the ruling was also proper, because the question failed to disclose any such purpose and an appropriate answer thereto could not give such information. *Ibid.*

Same: Competency of experts.

21. Testimony of a witness qualifying as an expert as to values of farm lands, that he had owned real estate in a city distant about one quarter of a mile, that he had owned acreage property, that he had theretofore bought and sold some, and that he had made inquiries as to market values, shows sufficient information on the subject to enable him to express his opin-

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ions on the questions covered, the grounds of his opinions and their weight being for the determination of the jury. *Pierce v. Chicago & Milwaukee E. R. Co.* 550

Weight and sufficiency. See ARBITRATION AND AWARD, 4, 8. BROKERS, 1, 3. CONTRACTS, 10, 18. CRIMINAL LAW, 3. DAMAGES, 3, 7, 10–12. DEEDS, 1. EMBEZZLEMENT, 1–5. EVIDENCE, 6–8, 21. FIRES, 3, 4. INDIANS, 5. MASTER AND SERVANT, 1, 2, 11, 21–24.

EXCEPTIONS. See APPEAL, 1–6, 11, 19.

EXCESSIVE DAMAGES. See DAMAGES, 11, 12.

EXECUTORS AND ADMINISTRATORS.

Presentation and allowance of claims: Contingent claims. See EVIDENCE, 12–15.

1. Under sec. 3844, Stats. (1898), where plaintiff had a claim for her husband's share in a partnership against the estate of the surviving partner, who died a nonresident and upon whose estate ancillary administration was granted in Wisconsin, such claim, though unliquidated, if not seasonably presented in the ancillary administration, cannot be the basis of an action in Wisconsin courts against the distributee of the surviving partner's estate. *Davis v. Davis,* 640
2. A contingent claim is one which may never accrue, where the liability depends upon some future event which may or may not happen; and therefore the fact that an accounting is necessary to determine the amount due as claimant's share in a partnership does not make the claim a contingent claim against the estate of a deceased partner. *Ibid.*

EXECUTORY CONTRACTS. See CONTRACTS, 1, 19–21. SALES, 1, 2.

EXEMPLARY DAMAGES. See DAMAGES, 1.

EXEMPTIONS. See MUNICIPAL CORPORATIONS, 9.

EXPERT TESTIMONY. See EVIDENCE, 18–21.

EX POST FACTO LAWS. See NEGLIGENCE, 4.

FEES. See JUSTICES' COURTS.

FINE. See PENALTIES.

FIRES.

See ARSON. DAMAGES, 5–7. EVIDENCE, 5. TRIAL, 2, 3.

1. A man may lawfully burn rubbish or brush upon his own land if he exercises that prudence in the starting of the fire and the management thereof after it has started which the rules of ordinary care demand. *Miller v. Neale,* 426
2. A man starting a fire on his own land is using a dangerous agent, and when there is much inflammable material on the ground, and the wind is strong in the direction of his neighbors' lands, he may be charged with negligence if he sets a fire, or if, having set it, he does not exercise that care to keep it under control which ordinary prudence dictates. *Ibid.*
3. In an action to recover damages resulting to the plaintiff's standing timber by reason of a fire alleged to have been negligently set on the defendants' land by their servant and which escaped from control and spread upon plaintiff's land, the evidence, stated in the opinion, is *held* sufficient to entitle the jury to

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find that there was negligence both in starting the fire and in taking care of it after it was started. *Ibid.*

4. In such case the evidence on the question of contributory negligence on the part of the plaintiff is *held* to have presented a question for the jury. *Ibid.*

FORECLOSURE. See BANKRUPTCY, 3. WILLS, 9–12.

FOREIGN CORPORATIONS. See PROCESS, 1.

FORFEITURE. See PENALTIES, 1, 2, 6. SUBROGATION, 3.

FRANCHISE. See MUNICIPAL CORPORATIONS, 10–14. TAXATION, 1.

FRAUD. See EVIDENCE, 4. LIFE ESTATES, 1. LIMITATION OF ACTIONS.

FRAUDULENT CONVEYANCES.

See BANKRUPTCY. DEEDS, 7. LIMITATION OF ACTIONS, 3.

Preferences to creditors.

1. That state of mind which in a reasonable man would lead to inquiry is called mere "suspicion," and as regards notice of fraudulent intent under which conveyances by a debtor to a creditor with intent to defraud are held void, the burden the state law has placed upon the freedom of doing business, that if a reasonably prudent man would be moved to inquiry, and inquiry would disclose facts leading to a belief, that is sufficient, is for the protection of creditors against actual fraud. *Stuart v. Farmers Bank,* 66

2. Apart from some statutes in case of assignments, there is nothing in state policy, nor in the policy of the common law, to prevent a debtor from honestly paying one creditor to the exclusion of others, although knowing and intending that thereby he would give a preference. *Ibid.*

FRONT-FOOT RULE. See MUNICIPAL CORPORATIONS, 4–6.

GARNISHMENT.

In an action by the plaintiff, assignee of a nonnegotiable note, the defendant pleaded payment under a judgment of a justice of the peace in an action wherein defendant was summoned as garnishee, but under the evidence, stated in the opinion, *held:*

(1) Payment of the judgment in the garnishment action was no defense in the instant action.

(2) The proof was sufficient *prima facie* to establish notice of the assignment of the note. *Holman v. Lueck,* 375

GENERAL APPEARANCE. See PROCESS, 2.

GENERAL DENIAL. See PLEADING, 5, 6, 15.

GIFTS. See DEEDS, 7. DESCENT AND DISTRIBUTION.

GROSS NEGLIGENCE. See BILLS AND NOTES, 4, 5.

GUARDIAN AD LITEM. See PLEADING, 3, 12.

HATCHWAYS. See MASTER AND SERVANT, 24. MUNICIPAL CORPORATIONS, 17, 18.

HEAT OF PASSION. See HOMICIDE, 3–6, 8.

HEIRS. See DESCENT AND DISTRIBUTION, 2.

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HIGHWAYS.

Establishment: Award of damages: Review: Equity.

1. Even though the order of the town board laying out a highway specifies all the land which the supervisors consider damaged, it is not necessary that it should specify all adjacent land which the board do not consider damaged or with regard to which the benefits may equal the damages. *Olson v. Curran,* 380
2. Town supervisors, having jurisdiction to decide what lands were damaged by the laying out of a highway, decided that the only damages sustained by the plaintiff by reason of the taking of land and laying out of the highway were upon one of two forties of plaintiff's land. *Held,* if the town board were in error in so doing, that it was error within their jurisdiction, which resulted in an insufficient allowance, and plaintiff's remedy was by appeal under the provisions of sec. 1285, Stats. (1898). *Ibid.*
3. In such case plaintiff is not entitled to equitable relief, not because he had an adequate remedy at law within the ordinary meaning of that expression, but upon the ground that the statutory remedy, in cases where it may be followed, is exclusive, and that a court of equity has no right to say that shall not be done which a valid statute authorizes to be done. *Ibid.*

Injuries from defects: Snow: Right of action.

4. No right of action exists at common law against municipalities for injuries sustained by reason of a defective highway, and the only provision in our statutes creating a liability, out of which a cause of action might arise on account of a defective highway, is sec. 1339, Stats. (1898). *Uecker v. Clyman,* 38
5. Under sec. 1339, Stats. (1898), as amended by ch. 305, Laws of 1899, no action is maintainable on account of injuries sustained by reason of an accumulation of ice and snow upon any highway, unless the accumulation complained of has continued for three weeks. Hence where a complaint for injuries, alleged to have been occasioned by an accumulation of ice and snow in a highway, fails to allege that such accumulation had existed for three weeks prior to the date of the injury for which the action is brought, no cause of action is stated. *Ibid.*
6. Sec. 1249, Stats. (1898), gives no right of action for injuries sustained by reason of a snow blockade in a highway, and, although a highway may be out of repair by reason of its being blockaded with snow, and the town officers may be negligent in failing to remove the blockade as required by sec. 1249, such negligence is not actionable unless it is made so by the provisions of sec. 1339, Stats. (1898). *Ibid.*

Same: Railroad crossings. See RAILROADS, 5–10.

HOLDER IN DUE COURSE. See BILLS AND NOTES, 3, 4, 6, 7.

HOMICIDE.

Evidence: Burden of proof: Eye-witness.

1. Whether or not in a criminal prosecution for homicide it is proper to require the state to call an eye-witness, a point not decided, it is within the discretion of the trial court to refuse a request in that behalf and such refusal will not be held erroneous unless there is an abuse. *Dillon v. State,* 655

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Trial: Instructions.

2. In a criminal prosecution for homicide, to justify the giving of instructions on the law of manslaughter in the first degree it should appear from the evidence (1) that the killing was done without design to effect death; (2) that it was done by the act, procurement, or culpable negligence of the defendant; and (3) that it was done while defendant was engaged in the perpetration of a crime or misdemeanor not amounting to a felony or while he was attempting to commit such crime. Hence it is not error to refuse instructions on that subject, where the evidence tended to show an assault or an assault and battery by defendant upon the deceased, but which had become a completed act before the homicide. *Dillon v. State,* 655

3. In a criminal prosecution for homicide it is not error to refuse to give as part of the definition of "heat of passion" a statement that heat of passion does not contemplate such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily, where "heat of passion" was completely defined in the charge, since, although the omitted statement might properly be given, it is merely illustrative. *Ibid.*

4. As a definition of "heat of passion" the term "obscurement of reason" is not synonymous with the term "dethronement of reason." *Ibid.*

5. In a criminal prosecution for homicide an instruction that "heat of passion" means such passion as amounts to temporary obscurement of reason and renders the slayer incapable of forming a premeditated design to kill, is not prejudicially erroneous, where the term has been otherwise fully defined in the charge. *Ibid.*

6. In a criminal prosecution for homicide the words "deliberate" and "premeditated" may be used interchangeably in an instruction defining heat of passion. *Ibid.*

7. Generally, in attempting to follow the statutory definition of a degree of homicide in instructions to the jury, the words of the statute should be given as they are found, with such explanation as is necessary to direct the jurors by way of defining the terms employed in the statute. *Ibid.*

8. In a criminal prosecution for homicide an instruction that, if the homicide occurred while the accused was in the heat of passion rendering him incapable of forming a "deliberate," "premeditated" design to kill, he should be convicted of manslaughter in the third degree, is not erroneous, although neither of the quoted words appears in the statute defining that degree. *Ibid.*

9. In a criminal prosecution for homicide it is not prejudicial error to give or refuse instructions on self-defense, where there is no evidence tending to establish justifiable homicide and the accused disclaimed killing the deceased in self-defense. *Ibid.*

10. It is unnecessary to instruct the jury as to any degree of murder or manslaughter concerning which there is not sufficient evidence to warrant conviction. *Ibid.*

11. In a trial for homicide it is proper to instruct the jury that consideration by the jury of a lower grade of offense would depend on its failure to convict of a higher grade, and that the jury need not consider a lower grade if it found accused guilty of a higher one. *Ibid.*

HOUSEHOLD GOODS. See SALES, 2.

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HUSBAND AND WIFE.

Relation: Presumptions. See EVIDENCE, 2.

Disabilities and privileges of coverture: Torts.

1. The doctrine that a wife is incapable of being guilty of a wrong jointly with her husband because of the ancient presumption that what a wife does in that regard in her husband's presence, or so near by as to be under his influence, is presumed to be under coercion of his will, so far as it once existed and is not obsolete, relates to a mere rebuttable presumption, not disability. *Jones v. Monson,* 478

Same: Crimes. See ARSON, 3, 5, 6. CONSPIRACY, 3.

Enticing and alienating.

2. A complaint, stated in the opinion, alleging in appropriate language the formation of a conspiracy to injure by depriving plaintiff of the affections and society of his wife, is *held* to sufficiently allege that the wrongful acts were perpetrated pursuant to a wrongful combination, and that such purpose was accomplished. *Jones v. Monson,* 478
3. The alienation of a wife's affections is such a wrong that a husband and wife, accomplishing it by concert of action, may be both liable for the resulting damage. *Ibid.*
4. What a father and mother may do in relation to their daughter continuing to reside with her husband, without inference of bad intent arising therefrom, is quite different from what a stranger may safely do as regards such interference. *Ibid.*
5. The relations of parent and child in their moral aspects, and legal as well, begin at the inception of the child's life and do not wholly end until life ends, and those relations carry with them certain duties and privileges as to advice and protection and helpfulness in case of need, the observance of which is so natural, so laudable, and so essential to the family happiness and welfare that acts ostensibly promotive thereof are not to be lightly held to have had a wicked purpose for their mainspring. *Ibid.*
6. In actions by a husband against a wife's parents for alienating the wife's affections, the true test to be applied to the evidence is: Were the parents in what they did actuated with reasonable parental regard for their child, or were they actuated by unreasonable ill will towards the husband or the wife, as the case may be? If the former and they yet, from the standpoint of a better or the best judgment, were wrong, excusably mistaking the true situation, the resulting injury is *damnum absque injuria.* *Ibid.*

Same: Instructions to jury.

7. In an action by a husband for damages caused by an executed conspiracy by the wife's parents to alienate her affections and deprive her husband of her society and assistance, the court instructed the jury as stated in the opinion. *Held,* that the language of the charge, while rather restrictive, was in favor of the parents and hence not prejudicial. *Jones v. Monson,* 478
8. In such instructions the use of the words "knowledge of the child's actual situation," instead of "knowing or reasonably apprehensive of the child's needs," or words of similar import, showing that the parents may advise upon reasonable appear-

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ances of necessity therefor as well as upon actual knowledge, if error at all, is error in the parents' favor. *Ibid.*

9. In an action by a husband for damages for alienating his wife's affections, declarations of the wife made out of court long after the alleged wrongful act was done are not evidence against the husband, and do not suggest an instruction directing the jury to consider advice or statements made to the wife subsequent to the separation. *Ibid.*

HYPOTHETICAL QUESTIONS. See EVIDENCE, 18–20.

ICE. See HIGHWAYS, 5, 6.

ILLEGAL CONTRACTS. See INSURANCE, 2–6.

IMPEACHMENT OF AWARD. See ARBITRATION AND AWARD, 6–8

IMPLIED COVENANTS. See VENDOR AND PURCHASER, 12–14.

IMPROVEMENTS. See MORTGAGES, 1–4. VENDOR AND PURCHASER, 15.

INCORPORATION. See CORPORATIONS.

INCUMBRANCE. See TAX TITLES, 2.

INDEBTEDNESS. See MUNICIPAL CORPORATIONS, 14–16.

INDEMNITY. See INSURANCE, 15–17.

INDEPENDENT CONTRACTOR. See MASTER AND SERVANT, 23, 24.

INDIANS.

1. A state court has jurisdiction of the subject matter of an action for assault and battery notwithstanding the fact that the parties are Indians and the occurrence took place on an Indian reservation. *Deragon v. Sero,* 276

2. The laws of Wisconsin for the peace and good order of people within its boundaries extend to Indian reservations and apply to infractions of such laws whether by persons of Indian blood or others. *Ibid.*

3. The reasonable limits of a direction to an Indian policeman by an Indian agent and Indian farmer, to keep people back from car entrances when persons are getting on and off cars, are that mere curiosity seekers, loafers, and persons having no business to go to a car entrance at a depot platform are to keep at a reasonable distance therefrom, so as not to interfere with the proper and safe transaction of business between the railroad company and its patrons in respect to railway travel; and it does not, reasonably, contemplate interference with a person going, in an orderly way, to a car entrance to meet and assist his wife and family in alighting from the car and taking care of them and their belongings. *Ibid.*

4. Such direction of the Indian agent and Indian farmer is no justification for an assault and battery by the policeman upon an Indian residing on a reservation, who, after having been ordered back from the front of a depot platform, persisted in his attempt to meet his wife and child then arriving upon a railway train. *Ibid.*

5. In an action by an Indian against an Indian policeman for an assault and battery committed while plaintiff was assisting his wife and child to alight from a train, in the pretended execution of a direction of an Indian agent and Indian farmer to keep people away from car entrances while passengers were getting on and off of trains at a depot platform, the evidence,

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stated in the opinion, is *held*, to require the submission to the jury of the question of punitory as well as actual damages. *Ibid.*

6. An assault and battery by an Indian policeman was attempted to be justified on the ground that plaintiff was violating a direction given by an Indian agent and Indian farmer. That direction, if so drastic as to justify the acts of the policeman, was unreasonable as matter of law. *Held*, that defendant was not prejudiced by submitting to the jury the question of the reasonableness of the direction. *Ibid.*

INDICTMENT AND INFORMATION.

Requisites and sufficiency of accusation. See ARSON, 4.

Plea in abatement: Demurrer.

1. In a criminal prosecution a demurrer to a plea in abatement—that defendant had not had a preliminary examination as provided by law, had never waived his right to such examination, and was not a fugitive from justice—admits the truth of the facts alleged and precludes the defendant from offering any proof thereon. *Guenther v. State*, 183
2. In such case, while sustaining the demurrer may be error, it will not require a reversal if no prejudice is caused thereby. *Ibid.*

INDUSTRIAL INSURANCE. See INSURANCE, 15–17.

INJUNCTION.

Grounds of relief. See MUNICIPAL CORPORATIONS, 8.

Preliminary injunction: Dissolution.

1. Where a complaint is demurrable only because several causes of action have been improperly joined, it is within the field of judicial discretion to continue a restraining order issued thereon in force until the plaintiff is given an opportunity to amend. *Carstens v. Fond du Lac*, 465
2. Where the only allegations of a complaint that would support an injunction were made on information and belief, and such averments were positively contradicted by affidavits filed on a motion to dissolve a temporary injunction and were not supported by counter affidavits, the court is *held* to have properly granted a motion to dissolve the injunction. *Ibid.*

IN PARI DELICTO. See INSURANCE, 5.

INSTRUCTIONS TO JURY.

Particular cases.

Erroneous instruction cured by correct statement elsewhere in charge. *Dillon v. State*, 655
What constitutes a preference. *Stuart v. Farmers Bank*, 66
Notice necessary to charge the indorsee of promissory note. *Kipp v. Smith*, 234
Not prejudicial to submit instructions on punitory damages where none are awarded by the jury. *Jones v. Monson*, 478
As to rule of damages for injury to standing timber by fire negligently started. *Anderson v. Savoy*, 44
Collection of debt in addition to prosecuting for embezzlement. *Guenther v. State*, 169

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Heat of passion in prosecution for homicide. *Dillon v. State*, 655
Rule of damages for alienation of wife's affections by an executed conspiracy of her parents. *Jones v. Monson*, 478
Ordinary care. *Hiroux v. Baum*, 197
Injuries to servant from defective machinery. *Wankowski v. Crivitz P. & P. Co.* 123

Form, requisites, and sufficiency. See APPEAL, 26. EVIDENCE, 6, 8.

1. Instructions to the jury which contain a statement of the plaintiff's testimony, and which somewhat confuse the claim of plaintiff made through his counsel as argumentative deductions from facts with the facts themselves, are *held* to be not prejudicial. *Wankowski v. Crivitz P. & P. Co.* 123
2. In an action to recover on a contract for personal services, an instruction as to the question of how long a period plaintiff was promised by defendant's son he should receive the increased wages claimed, though not very happily worded, is *held* to be free from any error, and not so phrased that the jury could reasonably have been misled. *Larson v. Foss*, 304
3. A charge to the jury is not required to contain a discussion of the evidence in connection with the legal propositions applicable thereto. *Jones v. Monson*, 478
4. A charge to the jury is not required to state a proposition more than once, nor adopt any particular phrasing of a proposition by counsel. *Ibid.*
5. In instructions to the jury it is not advisable to state any legal proposition applicable to the evidence in an argumentative way. *Ibid.*
6. In instructing the jury it is not necessary to enlarge upon the importance of a particular proposition in its moral or other aspects. *Ibid.*
7. The giving of instructions to the jury applicable to the evidence, good as far as they go, with no further instructions asked by way of explanation or otherwise, is not prejudicial although the jury may have gone astray. *Anderson v. Horlick's Malted Milk Co.* 569
8. A phrase of an instruction to the jury: "Where two witnesses directly contradict each other, and the veracity of neither is impeached, *the presumption of truth* is in favor of the witness who swears affirmatively," while disapproved for use of the words "presumption of truth," in connection with the other parts of the charge is *held* not to have misled the jury. *Ibid.*
9. In an action for personal injuries received by falling down an elevator shaft, a question of the special verdict inquiring as to whether the entrance to the elevator was *reasonably* guarded, stated in the opinion, is *held* to have substantially covered the calls of sec. 1636*j*, Stats. (1898), requiring all elevators to be "*securely* guarded and fenced." *Ibid.*

Requests for instructions.

10. Refusal of requests for instructions to the jury is *held* to be without error, where, so far as they stated correct principles of law applicable to the case, they were included in the charge as given, and those not so included had no substantial evidence on which to base them. *Miller v. Neale*, 426

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11. It is not error to refuse requested instructions applicable to the case which were substantially covered in the general charge. *Jones v. Monson,* 478

Construction and operation. See INSTRUCTIONS TO JURY, 8, 9.

12. It is not error as against the defendant to instruct the jury that the burden of proof is on the plaintiff to "*establish* the facts essential to his cause of action by a preponderance or greater weight of evidence." *Jones v. Monson,* 478

13. The word "establish," as applied to the quantum of evidence necessary to warrant the existence of a fact in issue, is more appropriate to a criminal than a civil case. *Ibid.*

INSURANCE.

MUTUAL COMPANIES.

Authority of officers: Illegal contracts.

1. The officers of a mutual indemnity insurance company organized under the laws of Wisconsin, without capital stock, and authorized to do business on the assessment plan, cannot sell any interest therein. *Sauerhering v. Rueping,* 407

2. An alleged agreement whereby plaintiff expected to secure by purchase from defendants, who were officers and directors of a mutual indemnity company, claims against such company which was organized without capital stock and authorized to do business on the assessment plan, the right to manipulate the company in his own interest by getting control of the directors and officers to be secured by the removal of some and the election of others of his own choosing, and to thereby secure the removal of such company to the plaintiff's city, is illegal and contrary to public policy and good morals. *Ibid.*

3. Such contract, if binding, bound the defendants to secure the removal of location of the company, regardless of whether such removal was for the interest of the members or not, and was in conflict with the duty which the defendants owed to the members of the company, who were entitled to the exercise of the judgment and discretion vested in defendants as its officers. *Ibid.*

4. Defendants' influence as officers and members of such mutual indemnity insurance company was not the subject of barter or sale, and the agreement to exercise such influence was illegal. *Ibid.*

5. In such case, it appearing that plaintiff was in possession of all the facts, and knew the company was a mutual assessment company and without capital stock, plaintiff and defendants were *in pari delicto,* and the law therefore should not afford plaintiff relief. *Ibid.*

6. In such case, where the alleged contract was performed, in part at least, on both sides, neither party is entitled to relief. *Ibid.*

LIFE.

Breach of contract by insurer: Waiver. See ELECTION OF REMEDIES, 2.

7. Where an assured, under a policy of life insurance alleged to have been breached by the passage of a by-law of the mutual company which issued the policy, continues for four years to make payments without objection, he cannot claim the benefits of the alleged breach. *Voss v. Northwestern Nat. L. Ins. Co.*

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8. A by-law was passed by a mutual life insurance company, obviously in good faith, to maintain the solvency of the company. The insured, and plaintiff the beneficiary, had notice of such purpose and knew the company was run on the idea that the by-law was valid. *Held*, that it was their duty, in justice to other members, to seasonably elect whether they would treat the passage of such by-law as a breach of their contract of insurance or not. *Ibid.*

9. In such case the question is not one of estoppel, but waiver. *Ibid.*

10. Where a mutual life insurance company, by the passage of a by-law providing for an increased premium, works a repudiation of its contract with an insured which justifies rescission, the insured cannot continue for four years to stand upon the policy, claiming the benefits of it without paying the increased premium, the company carrying the risk for the full value of the policy, while if rescission had been promptly made the appellant would only be liable for the damages caused by the breach. The insured cannot thus stand on repudiation or no repudiation as best serves his purpose. *Ibid.*

11. Where an insured received and for four years retained papers informing him of the corporate action of a mutual life insurance company in which he held a policy, and also informing him of the effect of such action on his policy, he cannot be permitted to say that he did not know the contents of such papers. *Ibid.*

12. Where a mutual life insurance company passed a by-law increasing the rates of premiums on existing policies (whether the passage and attempted enforcement thereof was a breach of its contracts of insurance being a point not decided), in an action for damages predicated on such breach it is *held* upon the whole record that both the insured and the beneficiary had waived the right to maintain the action. *Ibid.*

Action on policy: Surrender value: Cause of action: Married women.

13. In case of a policy of life insurance providing that it shall have a surrender value upon specified conditions, a cause of action to recover such value does not exist in advance of such performance. *Hilliard v. Wisconsin Life Ins. Co.* 208

14. A policy of life insurance on the life of a married man, unqualifiedly payable at maturity to his wife, is governed by sec. 2347, Stats. (1898); but one so made payable but conditioned that in a specified event it shall have a surrender value in which the beneficiary shall have no interest, is not as to such feature controlled by such statute. *Ibid.*

INDUSTRIAL INSURANCE.

Right of action: Conditions precedent.

15. Under a policy of insurance indemnifying the defendant corporation against loss by reason of injuries suffered by its employees, of whom plaintiff was one, the policy providing, "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment, and after trial of the issue," there is no privity of contract between the insurer and the

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employee, and the latter cannot reach the proceeds of such policy in an action brought directly against the insurer. *Stenbom v. Brown-Corliss Engine Co.* 564

16. While there might be fulfilment of the condition precedent to the right to maintain an action on such policy by payment otherwise than in money, such payment must be made and accepted in good faith and there must be a *bona fide* settlement and satisfaction of the judgment secured by the injured employee. *Ibid.*

17. Proceedings taken by the employee in attempting to subject such policy to his judgment secured against the defendant corporation, the corporation having been adjudged a bankrupt after the instant action had been brought, are *held* to have been a mere subterfuge resorted to for the purpose of making a nominal compliance with the terms of the insurance contract. *Ibid.*

INTENT. See DEEDS, 2. INTOXICATING LIQUORS, 1, 2.

INTEREST. See MORTGAGES, 5, 6, 9. TENDER, 3, 4.

INTERROGATORIES. See DISCOVERY, 7, 8.

INTOXICATING LIQUORS.

1. Under a statute prohibiting a licensee to sell or give away intoxicating liquors to minors without the written authority of parent or guardian, and providing that for such a violation the license shall be subject to revocation, the licensee's intent respecting alleged violations of the statute is not an essential factor in the offense. *State ex rel. Conlin v. Wausau,* 311

2. While the system of regulation of intoxicating liquors grants the licensee the privilege of conducting his business through an agent, it also imposes on the licensee the affirmative duty to see to it that every regulation is obeyed by his agents as well as himself. Hence such a licensee is answerable for the acts of his agents (barkeepers) though he is absent from his place of business and had instructed those agents not to make forbidden sales. *Ibid.*

3. Where a barkeeper, in the absence and without the knowledge of the saloonkeeper and in violation of instructions not to sell to any minor, such instructions being a condition of his employment, sold intoxicating liquors to a minor, the saloonkeeper is guilty of a violation of sec. 1558, Stats. (1898), and it becomes the duty of the body issuing him his license to revoke it. *Ibid.*

4. On *mandamus* to compel the revocation of a liquor license it appeared, among other things, that the license period had expired before the cause was heard on appeal from a judgment, entered during the life of the license, erroneously denying the writ. *Held,* that the relator is entitled to a reversal of the judgment with costs and to have judgment for costs in the trial court. *Ibid.*

JOINDER.
Of causes of action. See ACTION. INJUNCTION, 1.
Of parties. See APPEAL, 11.

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JUDGES.

See COURTS.

County judges: Compensation.

1. Under sec. 694, Stats. (1898), providing that the county board shall fix the salaries of county officers, including the county judge, in the absence of other specific provisions the salary of a county judge so fixed constitutes the sole compensation for all services which the law requires of him. *Hoffman v. Lincoln County,* 353
2. Under sec. 2454, Stats. (1898), as amended by ch. 45, Laws of 1903, judges of county courts which do not have civil jurisdiction are entitled to a *per diem* compensation for hearing applications for permits allowing minors to labor, except in counties where provision is otherwise made by law. *Ibid.*
3. The county court of Lincoln county is endowed with civil jurisdiction by ch. 249, Laws of 1895, and sec. 9 thereof provides that, in all matters, actions, and proceedings of which the county court and the judge thereof "had jurisdiction before the passage of this act," it should be lawful for him to receive and charge the same fees and *per diem* as theretofore allowed by law for like services, to be paid in like manner. Ch. 109, Laws of 1891, in force in 1895, prohibiting the employment of children under fourteen years of age in certain occupations, except upon a permit to be obtained from the county judge after examination into the circumstances, further provided that "no charge or fee shall be *required* under this section." *Held:*

   (1) The word "required" indicates that the intent was to make sure that the application should be entirely free to the applicant and to prevent the county judge from requiring such applicant to pay anything in order to secure the permit.

   (2) The county judge of Lincoln county was entitled to his *per diem* compensation from the county for time actually engaged in considering applications for child labor permits from and after the time of the passage of the act giving his court civil jurisdiction. *Ibid.*

JUDGMENT.

Amendment, correction, and review in same court. See ATTORNEY AND CLIENT, 3. COURTS, 5.

Opening or vacating. See APPEAL, 15. COURTS, 2, 5.

1. On a motion to set aside a judgment entered on default it appeared, among other things, that the complaint was duly verified and that the evidence offered was ample and sufficient to support the verdict of the jury on the amount of damages found. *Held:*

   (1) Under sec. 2891, Stats. (1898), plaintiff was obliged only to make proof of his damages.

   (2) Even if plaintiff proved more than he was obliged to, the evidence offered did not negative and in no way affected his right to recover.

   (3) It was not error to refuse to set aside the default judgment. *Phillips v. Portage Transit Co.* 189
2. On a motion to set aside a default judgment the allegations of the answer were very meager upon the facts going to the de-

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fense, and were upon the information and belief of the president of the defendant corporation, who, it appeared from the record, had no personal knowledge thereof, although conclusions of law were stated positively upon the knowledge of the pleader. There was no affidavit produced to support the allegations of the answer as to the merits of the defense. *Held*, that there was no abuse of discretion in the conclusion of the trial court that the ends of justice did not require that the judgment be set aside, or that such excuse had been shown as called for the exercise of the court's discretion in defendant's favor. *Ibid.*

Conclusiveness of adjudication: Involuntary nonsuit. See APPEAL, 27. ARBITRATION AND AWARD, 1.

3. A judgment rendered in a former action as the result of a motion for a nonsuit, made by the defendant at the close of plaintiff's testimony and before the defendant offered any evidence, and rendered because plaintiff was found guilty of contributory negligence, is not a judgment of dismissal on the merits, but a judgment of involuntary nonsuit, and is not a bar to another action brought upon the same grounds. *Gratz v. Parker*, 104

Same: Purchase by attorney pendente lite of subject of action: Effect of judgment on client's rights.

4. When the record shows that an attorney who had appeared for defendants in the action, but who had purchased from them the lands involved therein *pendente lite*, was defending the action and appealed from the judgment therein in their names, the defendants are bound by the judgment rendered in the action. *Emerson v. McDonell*, 263

5. In such case it is presumed that defendants knew that a judgment would follow the trial of the action in which they participated and were sworn as witnesses, and, having by consent conferred upon their attorney of record authority to give or receive notice of entry of such judgment, notice of entry thereof to such attorney is notice to defendants. *Ibid.*

6. In such case, notice of entry of judgment having been served on defendants' attorney, the situation did not bring defendants within the calls of sec. 2832, Stats. (1898). *Ibid.*

JUDGMENT ROLL. See APPEAL, 2, 5, 6.

JUDICIAL DAY. See OFFICERS, 2.

JUDICIAL POWER. See COURTS, 1.

JURISDICTION. See COURTS, 1. JUSTICES' COURTS, 2, 3. MUNICIPAL CORPORATIONS, 21, 22.

JUSTICES' COURTS.

See MANDAMUS, 4–6.

Appeal: Unlawful detainer.

1. Under sec. 3368, Stats. (1898), governing appeals in unlawful detainer actions, and sec. 3754, which governs appeals in other cases, an appeal from a judgment of restitution is fully perfected by giving the required undertaking, and the undertaking becomes effective although appellant neglects to pay the justice the enumerated fees. *Palin v. Probert*, 40

2. The provisions of sec. 3754, Stats. (1898), as to payment of fees are not mandatory, nor is such payment a jurisdictional fact,

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but an effective return may be made by the justice without their payment having in fact been made. *Ibid.*

3. Such rule is not affected by the fact that the appeal is taken from a judgment of a municipal court whose judge is placed on a salary, and who is required to collect the ordinary justice's fees and pay them into the public treasury, since it rests with the public authorities to apply the proper remedy for any neglect of the judge of such court to collect such amounts. *Ibid.*

JUSTIFICATION of assault and battery. See INDIANS, 4.

LACHES. See EQUITY, 3–5.

LANGUAGE. See NEWSPAPERS.

LAW OF THE CASE. See APPEAL, 27.

LETTERS. See CONTRACTS, 6. VENDOR AND PURCHASER, 1, 4–8.

LETTERS ROGATORY. See DISCOVERY, 9.

LICENSES. See INTOXICATING LIQUORS.

LIENS.
Equitable. See APPEAL, 28. SPECIFIC PERFORMANCE, 2, 3.
Mechanics'. See MECHANICS' LIENS.
Vendors'. See APPEAL, 28. SPECIFIC PERFORMANCE, 2, 3.
By will. See WILLS, 7–13.

LIFE ESTATES.

See LIMITATION OF ACTIONS, 21. TRUSTS AND TRUSTEES, 3. WILLS, 7–13.

1. In an action in equity to set aside conveyances, *held*, on demurrer:
(1) The allegation of the complaint that C. was the life tenant, in possession, at the time a tax title was obtained by the life tenant's second wife, and that she made her home with him, establish a fiduciary relation between the plaintiffs and the life tenant.
(2) It was the duty of the life tenant, for the benefit of plaintiffs, to pay the tax charges upon the property during his tenancy.
(3) The allegations as to failure of the life tenant to comply with such obligation pursuant to a collusive agreement between himself, his second wife, and her children for the purpose of obtaining the title to the lands and depriving plaintiffs of their interest therein, were sufficient to charge fraud. *Boon v. Root*, 451

2. In such case, under the allegation of the complaint that the second wife was the wife of the life tenant and occupied the premises with him as their home, she would be required to explain the transaction of securing the tax title and to establish that it was taken by her in good faith. *Ibid.*

3. In an action by remaindermen to set aside a tax deed alleged to have been collusively obtained by a life tenant, his wife, and her children by a former marriage, allegations that the grantor made, executed, and delivered a conveyance of the premises to the remaindermen and life tenant as grantees therein, that it was duly recorded, and that the life tenant held possession under it as such life tenant, if proven, are sufficient to show execution and delivery of the instrument. *Ibid.*

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4. Under the allegations of a complaint the defendants were charged with fraudulently conspiring with a life tenant to deprive the plaintiffs, remaindermen, of their interest in lands which the defendants claimed to own under a tax title procured by such fraud. *Held*, that the instruments and muniments of title flowing from the tax-sale proceeding could not be reached in an action of ejectment, but would be left uncanceled. *Ibid.*

5. In such case, to secure relief against the injurious acts affecting plaintiffs' interest in the land, such fraudulent and hostile record titles can only be impeached by proof of transactions *aliunde* the record; hence a suit in equity may be maintained to remove the clouds created by such fraudulent titles, and the court may in such suit decree the cancellation of such instruments and records and the execution of such conveyances as may be necessary to protect plaintiffs' right in the premises. *Ibid.*

6. When the life tenant dies the remainderman may take the property under the conveyance, is entitled to the possession, and may maintain necessary actions to enforce his right. *Ibid.*

LIFE INSURANCE. See INSURANCE, 7–14.

LIMITATION OF ACTIONS.

Limitations applicable to particular actions. See SEALS.

1. Secs. 1188, 1189*a*, 1189*b*, Stats. (1898), prescribing limitations to actions by former owners to recover possession of lands sold for taxes, or to avoid a tax deed, have no application to actions to annul a tax deed for fraud in the proceedings. *Boon v. Root*, 451

Computation of period of limitation: Accrual of right of action. See ATTORNEY AND CLIENT, 2. EQUITY, 5.

2. In an action founded on fraud, if it be established that the plaintiffs, remaindermen, had no knowledge of the facts concerning the fraud until after the death of a life tenant, which occurred within a year prior to the commencement of the action, the action is one embraced within subd. 7, sec. 4222, Stats. (1898), and hence is not barred by limitation. *Boon v. Root*, 451

3. For the purposes of the statutes of limitation a cause of action in favor of a judgment creditor, to reach lands alleged to have been conveyed in fraud of creditors, is deemed to have accrued upon the discovery of the facts constituting the fraud. *Foote v. Harrison*, 588

LOGS AND LOGGING.

Contracts: Breach: Evidence.

1. In an action to recover a balance claimed to be due for cutting, skidding, and banking logs and to enforce a lien therefor, it is *held* under the evidence that, defendant having breached the contract by refusing to permit a test scale as provided in the contract, it was competent for the plaintiff to show by testimony the actual number of feet of logs cut and banked, although it varied from that made by the scaler named under the contract. *Thiel v. John Week Lumber Co.* 272

Trespass: Damages.

2. Trees felled and cut into cordwood by a trespasser, which had attained such size as, in the use of forest products, to be com-

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monly regarded as timber suitable for manufacture into a marketable product, are within the calls of sec. 4269, Stats. (1898), providing the rule for assessment of damages for wrongfully cutting timber. *Pettingill v. Goulet,* 285

MANDAMUS.

Nature and grounds.

1. A writ of *mandamus* cannot be employed to perform the functions of appeal or writ of error. *Braun v. Campbell,* 401

2. A writ of *mandamus* will not be awarded for relief from the action of inferior courts, unless it be clearly shown that such a court has violated a plain duty, that such violation of duty has produced a substantial injury to the petitioner for which he has no other adequate remedy in the law, and that he will be subjected to an injustice in the law unless such relief is awarded. *Ibid.*

3. The remedy by *mandamus* is a legal one, but is granted only on equitable grounds, when, in the sound discretion of the court, it should be employed to prevent a failure of justice in a matter of a weighty and important nature. *Ibid.*

Subjects and purposes of relief: Acts and proceedings of courts.

4. If a justice of the peace makes incorrect entries in his docket, the circuit court, in the exercise of its supervisory control, has the power by *mandamus* to compel him to make the true entries according to the real facts. *Braun v. Campbell,* 401

5. On *mandamus* to compel a justice of the peace to correct the entries in his docket, the allegations of the petition stand admitted by a motion to quash the writ for the reason that the facts stated were not sufficient to entitle petitioner to relief, and it is therefore error to quash the writ on the ground that the docket entries imported verity and could not be contradicted and corrected in such proceeding. *Ibid.*

6. On *mandamus* to correct the docket entries of a justice of the peace, upon the record, stated in the opinion, *held:*

(1) The loss of jurisdiction by the justice depending upon the certainty with which the time of day was observed and involving a variation of twenty minutes, such slight difference in time could not be received as a clear and certain fact, in the light of common knowledge respecting the liability of mistake in observing the time of day.

(2) The circumstances alleged as tending to show loss of jurisdiction and the falsity of the docket entries, surrounded by such uncertainty, did not present such a clear case of fact as called upon the court to award the extraordinary remedy of *mandamus.*

(3) The uncertainty in the case being coupled with the fact that the amount of pecuniary injury to petitioner may be only the small sum of costs and disbursements in the justice's court, no occasion is presented for the issuance of the writ. *Ibid.*

Costs. See INTOXICATING LIQUORS, 4.

MANDATORY STATUTES. See JUSTICES' COURTS, 2.

MANSLAUGHTER. See HOMICIDE, 2.

MARRIAGE. See EVIDENCE, 2.

MARRIED WOMEN. See INSURANCE, 14.

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MASTER AND SERVANT.

The relation: Creation and existence. See EVIDENCE, 5. INSTRUCTIONS TO JURY, 8. MASTER AND SERVANT, 21–24. TRIAL, 9, 10.

1. In an action to recover on a contract for personal services, the evidence, stated in the opinion, is *held* to establish a contract upon the showing of actual authority of defendant's son in the matter, or of apparent authority and reasonable reliance thereon, or of assumption of such authority and reliance thereon followed by ratification by defendant. *Larson v. Foss,* 304

Services and compensation. See EMBEZZLEMENT, 2, 5.

Master's liability for injuries to servant: Tools, machinery, and appliances. See TRIAL, 5.

2. In an action for personal injuries to a servant by being caught in the cogs of wheels on a revolving shaft which he was attempting to oil, it is *held* that there was evidence to go to the jury on the possibility and probability that plaintiff was directed to oil the machinery, the credibility of the witnesses being for the jury. *Wankowski v. Crivitz P. & P. Co.* 123
3. In such case it is also *held* that the right of the plaintiff to understand, and his understanding, that the direction to oil the machinery included oiling the machinery at the place plaintiff was injured, was an inference of fact which the jury might draw from the testimony. *Ibid.*
4. Upon the evidence in such case, stated in the opinion, it is *held* that the danger which might be incurred in oiling the machinery was not so obvious to a person of plaintiff's age, understanding, and inexperience as to either relieve the master of his duty to warn as matter of law or to charge the plaintiff as matter of law with contributory negligence. *Ibid.*
5. *Chopin v. Badger P. Co.* 83 Wis. 192, like all precedents in negligence cases, is necessarily limited to the points actually decided upon the facts then before the court, and as an authority has not been shaken or overruled. *Ibid.*

Same: Safe place to work. See INSTRUCTIONS TO JURY, 9. RAILROADS, 11–14.

6. The legislature, in the proper execution of its police power, having by sec. 1636*j*, Stats. (1898), created the standard of the master's duty toward servants "in the discharge of their duty," the court should not interpolate into the statute the word "ordinary" and thereby test the master's conduct by a different standard. *Miller v. Kimberly & Clark Co.* 138
7. Although unguarded and defective shafting was suspended so high above the working floor as to be beyond the reach of servants in the discharge of their duties thereon, the servants having other duties, which required them occasionally, as the master must have known, to mount and walk upon timbers in the vicinity of the dangerous and unguarded shafting, the master ought reasonably to have apprehended that the condition of the shaft endangered the servants and was within the statute. *Ibid.*
8. Where a servant was injured by having his overalls caught in an imperfect set-collar on a rapidly revolving but unguarded shaft, in the absence of proof that the set-collar was originally free from the dangerous defect, it is not error to submit the case to the jury on the question of negligence and proximate

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cause, on the theory that the shaft was to be regarded as including the set-collar and had been, from the start, in the condition it was found on the day of the injury. *Ibid.*

9. In such case, the defect not being one which affected the efficiency of the device, nor necessarily developed by use, it was incumbent upon the master, in the first instance, to show that the imperfection did not enter into the original construction, rather than on the servant to prove there was negligent failure to repair. *Ibid.*

10. Where there is conflict in the evidence as to whether there were reasonable inferences rendering any other way chosen quite as dangerous as that which the servant followed, and the way chosen was one pointed out as the proper one by the person to whom the master referred the servant for instructions when he commenced work, the trial court did not err in submitting the question of contributory negligence of the servant to the jury. *Ibid.*

Same: Warning and instructing servants. See MASTER AND SERVANT, 4. RAILROADS, 14.

11. In an action by an adult servant for personal injuries, alleged to have followed upon the failure of the master to instruct and warn the plaintiff before or at the time of placing him to work, under the evidence, stated in the opinion, the master was justified in presuming that the servant was an inexperienced adult of ordinary intelligence, and hence that his duty to instruct or warn was only that which the law imposed upon him with respect to any ordinarily intelligent but inexperienced adult servant. *Rahles v. J. Thompson & Sons Mfg. Co.* 506

12. In such case it is *held* that no negligence of the master causing the injury complained of was shown by his omission to caution or instruct the servant. *Ibid.*

13. The master is not by law required to explain or instruct against obvious danger, nor with reference to the obvious function of a treadle, nor to anticipate that the servant was ignorant of the existence, or of the function, of the treadle of a machine which the servant could plainly see in operation. *Ibid.*

Same: Assumption of risk: Contributory negligence: Special verdict. See MASTER AND SERVANT, 4, 10. RAILROADS, 14.

14. In actions for personal injuries caused by the negligence of the master, while there may be similarity, and even equivalency, of assumption of risk with contributory negligence, they are not absolutely identical for all purposes and under all circumstances. *Campshure v. Standard Mfg. Co.* 155

15. In a special verdict separate questions relative to assumption of risk and relative to contributory negligence should, in a case where the evidence presents such separate conditions, be submitted, unless these two subjects are grouped by the charge under a question relative to contributory negligence. *Ibid.*

16. Where such two questions are so grouped, separate questions need not be submitted unless requested by the party entitled to make such request. *Ibid.*

17. The rule that separate questions upon assumption of risk and contributory negligence should, in a proper case and when requested, be submitted to the jury, is only justified on the ground that the jury would be authorized to find or might find

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different answers to each of the two questions, which answers would not necessarily be inconsistent. The question of inconsistency depends upon the evidence in the particular case considered with reference to the questions submitted or with reference to the instructions given, or with reference to both. *Ibid.*

18. In such case, if no other "form," "phase," or "species" of contributory negligence than assumption of risk is shown by the evidence, different answers to separate questions may be inconsistent; but if there is evidence tending to show contributory negligence as distinguished from assumption of risk, and also from that "phase," "form," or "species" of contributory negligence called "assumption of risk," then different answers are not necessarily inconsistent. *Ibid.*

19. Where, in an action by a servant for personal injuries, the appellate court cannot say on the evidence, as matter of law, that there was or was not contributory negligence as charged, and the jury on sufficient evidence have found plaintiff's assumption of the risk, such finding is decisive against the plaintiff's right to recover. *Ibid.*

20. In an action by a servant for personal injuries it is *held* that the questions of negligence and contributory negligence or assumption of risk were properly for the jury, and that the trial court did not err in setting aside on that ground a verdict which, at the close of the evidence, it had directed for the defendant. *Nelson v. A. H. Stange Co.* 309

Liability for injuries to third persons: Acts or omissions of servant. See INTOXICATING LIQUORS, 2, 3.

21. In an action for injuries by collision with an automobile owned by defendant but operated by defendant's son, the evidence, stated in the opinion, is *held* sufficient to support a finding that the son was acting as the father's servant. *Hiroux v. Baum,* 197

22. In such case the fact that the son was running the automobile by authority of the father is sufficient to make a *prima facie* case of master and servant. *Ibid.*

Same: Work of independent contractor.

23. In an action for injuries by collision with an automobile owned by defendant it appeared that defendant's son was actually operating the machine, but under the instructions of a third person from whom the machine was purchased under an agreement to give the son such instructions. *Held,* that while the question as to whether or not the third person had possession of the automobile as an independent contractor was close, the jury were warranted upon the evidence and the legitimate inferences to be drawn therefrom in finding that the son was the agent and servant of the defendant in the operation of the automobile. *Hiroux v. Baum,* 197

24. The lessee of a building, to whom a drayman was delivering merchandise through a hatchway which he left open and unguarded, is liable to a pedestrian who falls through the hatchway for the negligence of the drayman, in the absence of evidence that the drayman was acting independently of the control of the lessee. *Murphy v. Herold Co.* 609

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Instructions to jury.

25. In an action by a servant for personal injuries, the court, in reference to a question of the special verdict as to whether the defendant's superintendent ordered plaintiff to do the act from which the injury followed, instructed the jury as stated in the opinion. *Held*, that this instruction is subject to the criticism that it informed the jury of the result of their answer, but that it did not go so far as to inform them expressly or by necessary implication of the effect of the answer upon the ultimate right of either party litigant to recover, and hence was not prejudicial error. *Wankowski v. Crivitz P. & P. Co.* 123

26. In an action by a servant for personal injuries by being caught in the cogs of wheels on a revolving shaft which he was attempting to oil, the court instructed the jury as stated in the opinion. *Held* that, considering the words of the instruction, "the danger of this thing happening to him," as equivalent to the danger of getting his hands or clothing caught in the gearing, the instruction was correct and within the rule of *Chopin v. Badger P. Co.*-83 Wis. 192. *Ibid.*

Interference with the relation by third persons: Civil liability.

27. While an action to redress the wrongful prevention, by defendants, of a fellow laborer from soliciting work, from engaging in a contract to work, or from continuing in such work should ordinarily be brought by the servant so prevented, yet at the same time a right of action accrues to the master, where the servant is coerced to break an existing contract with the master, or where abuse and violence backed by conspiracy amounts to an actionable interference with the employer's rights. *Badger Brass Mfg. Co. v. Daly*, 601

Same: Pleading.

28. In an action by a master to enjoin the wrongful prevention of his servants from carrying out their contracts of employment, the complaint should be detailed, certain, and specific, giving facts and circumstances, including time and place of each alleged act of coercion, the name of the person coerced, if known, the manner in which he was coerced, and the manner in which and the extent to which it affected or impeded the master's right to conduct his business in a lawful way. *Ibid.*

MAXIMS.
De minimis non curat lex, 23.
Falsa demonstratio non nocet, 332.
In pari delicto, 408, 413.
Res ipsa loquitur, 388, 396.
Stare decisis, 75.
Utile per inutile non vitiatur, 332.

MEASURE OF DAMAGES. See DAMAGES, 2–10. EMINENT DOMAIN. LOGS AND LOGGING, 2. MORTGAGES, 3, 4. NAVIGABLE WATERS, 1, 4–8, 10, 11.

MECHANICS' LIENS.

Subcontractor's lien.

1. A compliance with the provisions of sec. 3315, Stats. (1898), is a condition precedent to the right of lien by a subcontractor, and it is essential that the notice provided for therein contain all the features indicated by that section. *Chandler Lumber Co. v. Fehlau*, 204

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2. A statement in the notice given by a subcontractor claiming a lien under sec. 3315, Stats. (1898): "Materials furnished: Lumber and mill work to the value of $1,100," while meager and not to be commended, is *held* to be a compliance with that section. *Ibid.*

3. A clause in the notice, "that the undersigned has furnished such materials, pursuant to such employment, to the amount and value of $1,100," does not satisfy the call of sec. 3315, Stats. (1898), which in express terms requires the notice to state the amount due. Such requirement cannot be supplied by inference. *Ibid.*

MISJOINDER OF CAUSES OF ACTION. See ACTION.

MISTAKE. See COURTS, 5.

MORTGAGES.

See CHATTEL MORTGAGES.

Execution and delivery. See SPECIFIC PERFORMANCE.

Lien and priority. See BANKRUPTCY, 3.

Foreclosure by action. See BANKRUPTCY, 3.

Redemption: Expenditures by mortgagee in possession: Accounting.

1. The general rule is that a mortgagee in possession is entitled to reimbursement by the owner of the right of redemption for his reasonable expenditures to preserve the property, such as taxes, repairs, and the like, but not outlays for permanent improvements. *Lynch v. Ryan,* 13

2. If a mortgagee in possession makes permanent improvements of the property with the approval of the mortgagor, or which are necessary to the proper and profitable use of the property and without objection by the mortgagor, he is entitled to be equitably reimbursed therefor by the latter as a condition of his exercising the right of redemption. *Ibid.*

3. Where a mortgagee should be reimbursed as aforesaid the proper basis of compensation is the reasonable cost. *Ibid.*

4. Evidence showing that repairs or improvements of mortgaged property were made as a judicious owner would make the same in caring for his own property is sufficient, *prima facie,* to show that the charges therefor are reasonable. *Ibid.*

5. In an accounting between a mortgagee in possession and the mortgagor there should be no rest resulting in compounding interest. It is proper to close the account at the end of each year; striking a balance between debit and credit items, excluding the original debt and interest thereon, any balance in favor of the mortgagee after discharging the interest to be added to the principal and any balance in favor of the mortgagor going in reduction thereof. *Ibid.*

6. If a mortgagee in possession is not allowed expenditures in making permanent improvements of the property which increase its value and is charged with the rental value of the property as improved, he should be given credit with interest on the reasonable cost of the improvements, unless such cost exceeds the enhanced value of the property, in which case he should be credited with interest on such enhanced value. *Ibid.*

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7. If a mortgagee in possession incurs expenses for insuring buildings thereon against loss by fire, he should be allowed credit therefor. *Ibid.*

8. A mortgagee in possession is not entitled to credit for services in supervising the property. *Ibid.*

9. In an accounting between mortgagor and mortgagee where there is an annual closing, interest on the items down to the time thereof should not be charged or credited. *Ibid.*

10. As a general rule, in an action by a mortgagor against the mortgagee in possession to establish his right of redemption and for an accounting, the defendant should recover costs notwithstanding plaintiff prevails. *Ibid.*

11. In such an action as above mentioned if the defendant is at fault, rendering expensive litigation necessary to establish plaintiff's right to redeem, the plaintiff may, in the discretion of the court, be allowed costs. *Ibid.*

12. Generally in a suit for redemption of mortgaged property and for an accounting if the circumstances are exceptional, warranting the imposition of costs upon the defendant, recovery should be contingent upon plaintiff exercising his right of redemption, but under exceptional circumstances whereby the plaintiff by defendant's wrong is put to very burdensome expenses to establish his right, the recovery of costs may properly be made absolute. *Ibid.*

MUNICIPAL CORPORATIONS.

Amendment and repeal of charter provisions.

1. The charter of the city of Fond du Lac (sec. 1, subch. 18, ch. 152, Laws of 1883) makes it the duty of abutting owners to keep in repair sidewalks in front of their premises, and then imposes a liability for failure to comply with that duty. The common council of that city, by ordinance, adopted subch. XIX, ch. 40*a* (secs. 925—201 to 925—207), Stats. (1898), pertaining to sidewalks, "in lieu of the provisions now existing upon said subject in the special charter governing said city." *Held* that, by reason of the passage of such ordinance, sec. 1, subch. 18, of the special charter of the city of Fond du Lac was repealed, and that after such repeal no right of action could arise in favor of an injured party against a property owner by reason of a defect in a sidewalk abutting on his premises. *Willmer v. Goebel,* 419

Public improvements: Contracts: Manner of payment.

2. A village board has authority to appoint a street commissioner and authorize him to hire men and teams and do general highway work under the orders of the board, and direct the commissioner to employ men and teams by the day, and proceed to fill up holes and turnpike the main village street for a distance of seventy rods with gravel hauled from a pit owned by the village, and defray the expense out of the general highway funds of the village created under secs. 911, 912, Stats. (1898). *State ex rel. McClure v. Wallschlaeger,* 136

3. Sec. 921, Stats. (1898), does not prevent the repair of highways by the employment of men and teams by day's work, even though the total expense of the entire work may exceed fifty dollars. *Ibid.*

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Same: Assessment for benefits and special taxes.

4. Secs. 925—216 to 925—218, Stats. (1898), providing for the assessment for special improvements against adjoining lots at an even rate not exceeding $2 nor less than twenty-five cents per linear foot on the whole frontage of each lot, apply to public sanitary sewers, and are constitutional as a legitimate exercise of police power. *Chicago, M. & St. P. R. Co. v. Janesville,* 7

5. Assessments against adjoining property need not be limited to benefits received where such assessments are properly made under the police power. *Ibid.*

6. The assessment for street improvements by the front-foot rule, resulting from proceedings commenced under sec. 925—175, Stats. (1898), authorizing a city to cause its streets to be paved upon a vote of two thirds of the members of the common council, the cost of such improvement to be assessed upon the property benefited, a petition purporting to comply with sec. 925—176 having been filed during the proceedings, if not a compliance with the statutes, constitutes an irregular exercise of power merely. *Lawton v. Racine,* 593

Same: Enforcement of assessments and special taxes.

7. A lotowner challenging a completed street improvement must show not only that the power to make the improvement was irregularly exercised, but that he is damaged thereby and without fault himself. *Lawton v. Racine,* 593

8. Where a lotowner, at the time he purchased, knew that his grantor had signed the petition for the paving of the street in front of his premises, and knew that the paving was being done and made no objection until after it was completed, the cost of the improvement being reasonable and the lotowner's premises being benefited to the extent of the assessment against them, he is estopped to maintain an action to enjoin the issuance of bonds to pay for such paving. *Ibid.*

Same: Pleading. See ACTION.

Same: Exemptions.

9. The charter of the city of Fond du Lac (ch. 59, P. & L. Laws of 1868, as amended by ch. 299, Laws of 1885) provides that two thirds of the total cost of street paving may be charged against abutting property, leaving one third to be paid by the city, but that such provisions should not apply to second or subsequent repaving of any street which had theretofore or should be thereafter paved. Under this provision the street in front of plaintiffs' premises was improved in 1890 through its entire width and two thirds of the expense thereof, except street crossings, was charged against the real estate fronting thereon and paid by the owners thereof, the remaining one third being paid by the city. After the passage of the amendment of 1885 a number of streets of the city which had theretofore been paved at the expense of the abutting property owners were repaved, but at the expense of the city. In 1904 the city of Fond du Lac adopted the portions of the general city charter law relating to street improvements in lieu of those contained in its special charter, and in 1907 repaved the street on which plaintiffs' property abutted and sought to charge the abutting property with the expense of the repaving under the provisions of the general city charter. *Held:*

(1) Even if the city authorities incorrectly construed the

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amendment of 1885, and a portion of the cost of repaving done thereafter should have been paid by special assessment against abutting lots, the city was not thereafter estopped from making a special assessment to defray the expense of a new pavement under that part of the general city charter adopted by it.

(2) Compliance with a statutory duty enjoined upon the lot-owners did not create a contract by operation of law which exempted the plaintiffs from further special assessments for the cost of street paving.

(3) The amendment of 1885 did not give any vested rights to exemption from further special assessments on account of repaving.

(4) The amendment of 1885 was subject to amendment and was amended by the adoption of that portion of the general city charter which related to street improvements in lieu of the provisions of the special charter, and thereafter the provisions of the special charter governing street improvements stood repealed. *Carstens v. Fond du Lac,* 465

Same: Acquisition of waterworks from private corporation: Notice. See APPEAL, 1, 4, 8.

10. In proceedings by a city to exercise a right to acquire a waterworks plant owned and operated under an ordinance-contract granting the franchise therefor, which provided, in case the city should exercise a reserved option to purchase, that all assigns of the original grantee should be effectively notified by giving notice to the chief officer in charge of the waterworks, the contract provision is *held* reasonable and notice so served binding on all claiming an interest under the original grantee. *Eau Claire v. Eau Claire Water Co.* 517

11. In such case, on an arbitration as to values, a mere lienholder is not entitled to notice of the daily hearings before the arbitrators, but in view of the record, if such notice was necessary, it is *held* to have been waived, as well as any defect in the preliminaries to the selection of the arbitrators. *Ibid.*

12. A contract-ordinance, whereby a city granted a water company the right to construct a waterworks system, is *held* to be reasonable and not open to the objection that it cannot be specifically enforced because the city therein reserved the right to purchase, without a corresponding right in the water company to enforce a sale. *Ibid.*

13. An ordinance-contract providing for the method of a city's acquiring a waterworks plant required that, to the extent of any outstanding bonds, the purchase price should be paid to the trustees for such bonds, otherwise the payment to be made to the holder of the title, and under the evidence, stated in the opinion, *held,* that an actual, manual tender thereafter made to the trustee was sufficient. *Ibid.*

[14. Where an ordinance-contract provided that the municipality could take over a waterworks plant from the water company to which the franchise for its construction and maintenance was granted, on the payment of a valuatfon fixed under the provision of such ordinance-contract, whether the water company can raise objection that the amount of the valuation so fixed brought the indebtedness of the municipality above the constitutional limit of five per cent. on its assessed valuation, when the actual money was in the possession of the municipality and

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was tendered to the water company and its mortgagee, not decided.] *Ibid.*

Fiscal management: Power to incur indebtedness: Constitutional limit. See MUNICIPAL CORPORATIONS, 14. TENDER, 4.

15. In determining whether the amount of the indebtedness of a municipality will exceed the constitutional limitation of five per cent. on its assessed valuation, the following items are *held* proper offsets to its present or prospective amount of indebtedness: (1) a sinking fund accumulated against outstanding municipal bonds; (2) the amount of the general fund then in the treasury; (3) a credit fund consisting of certain special assessments for pavements, sewers, and sidewalks, levied in definite amounts upon specific parcels of property, drawing interest, although payable in annual instalments. *Eau Claire v. Eau Claire Water Co.* 517

[16. Whether sums which had been contributed by subscribers for proposed nonliability bonds to be issued upon the security of such waterworks after the same should be acquired can be considered as an asset in reduction of such constitutional limit, not determined.] *Ibid.*

Defects and obstructions in streets: Hatchways. See MASTER AND SERVANT, 24.

17. A pedestrian, who knew of the existence of a hatchway and that it was sometimes open, is not necessarily guilty of contributory negligence as matter of law for failing to look and discover that it was open before he walked into it. *Murphy v. Herold Co.* 609

18. A pedestrian has the right to presume that a known hatchway, if open, will be properly guarded, and is not chargeable with knowledge that it is in fact open, in the absence of notice of such condition. *Ibid.*

Same: Sidewalks. See MUNICIPAL CORPORATIONS, 1.

Claims against corporation: Ownership.

19. A claim filed against a city entitled "City of J. to H. and L., attorneys for B.," is ambiguous as to the ownership of the demand. *Hanrahan v. Janesville,* 1

Same: Formal requirements.

20. No great formality is required in reference to the form in which claims are to be presented against a municipality. *Hanrahan v. Janesville,* 1

Same: Appeal to circuit court: Ambiguity as to ownership.

21. While, under statutes providing for the manner in which appeals may be taken from inferior bodies or tribunals to the circuit court, failure to comply in every substantial particular with the statutory requirements pertaining thereto is usually held fatal to the jurisdiction of the appellate court over the subject matter of the action, it is not promotive of the ends of justice to unduly extend the application of such rule. *Hanrahan v. Janesville,* 1

22. A mere ambiguity as to the ownership of a claim filed against a municipality is not a defect affecting the jurisdiction of the circuit court on appeal, where the appeal is taken by the true owner from a disallowance made on the merits of the claim. *Ibid.*

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23. A claim filed against the defendant city, entitled "City of J. to H. and L., attorneys for B.," having been disallowed on the merits by the common council, H. and L., who asserted ownership of the claim and that it was filed as their claim, appealed from the action of the common council. On a motion to dismiss the appeal oral testimony tending to show that H. and L. were in fact the owners of the claim filed should be received. *Ibid.*

MURDER. See HOMICIDE.

MUTUAL INSURANCE. See INSURANCE, 1–6.

MUTUALITY. See CONTRACTS, 1–3.

NAVIGABLE WATERS.

Rights of public: Improvement by public-service corporation: Dams: Surplus water power.

1. The Wisconsin River Improvement Company, incorporated under a special charter, was authorized to improve the Wisconsin river in such manner as it should deem expedient or advisable, and was given authority to erect and maintain dams and to acquire by condemnation proceedings land along the river for the purpose of facilitating and cheapening the driving and floating of logs, timber, and lumber in the river. At a time when the driving and floating of logs in the Wisconsin river was very much diminished from its former proportions, the Improvement Company entered into a contract with the Tomahawk Power Company, a corporation formed for the purpose of heating, lighting, or furnishing power or signals by electricity, whereby the latter corporation was to construct dams and river improvements in the territory within which the Improvement Company was authorized to act, at its own expense, and in consideration thereof the Power Company was to reimburse and profit itself by the sale of power. *Held:*

   (1) In so far as the Tomahawk Power Company is a corporation organized to furnish power, that authority and duty is distinct from any other corporate authority it may have assumed by any additional provisions in its articles.

   (2) Under ch. 499, Laws of 1907 (sec. 1797*m*—1, Stats.), the public are entitled to use and enjoy the power created by dams and improvements upon its navigable rivers, not as a mere favor or by mere permission of the owner, but by right. *Wisconsin River Imp. Co. v. Pier,* 325

2. In such case by "the public" is meant, not the whole population of the state, but all persons who require power and are willing to pay reasonable rates therefor. *Ibid.*

3. "Public use" is not synonymous with "public benefit." *Ibid.*

Same: Navigation: Eminent domain.

4. A corporation possessing the power of eminent domain, to be exercised in aid of navigation by the construction of a dam, after entering into a contract for the construction of a dam with a public-service corporation, whereby the latter was to construct the dam solely at its own expense and to have all the profits arising from the sale of power generated at the dam and the former to retain its right to collect the tolls arising from navigation and retain control and management of the improvement for all purposes of navigation, may exercise such

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right of eminent domain, although the rates for power will probably exceed the tolls for navigation, and the corporation possessing the power of eminent domain would probably not have voluntarily exercised that right had it not made such a contract. *Wisconsin River Imp. Co. v. Pier,* 325

5. In such case the value of the improvement to navigation is not to be measured alone by the probable amount of tolls to be received; nor does the fact that the revenues to be derived from the sale of power may largely exceed the tolls to be derived from navigation furnish the test of which is the incidental and which is the primary purpose of the improvement so far as public interests are concerned. *Ibid.*

6. A dam may be as effectual in aid of navigation in a case where the owner can get it built by foregoing or assigning his right to some collateral use of the dam as in a case where he is obliged to put his own money into the construction. *Ibid.*

7. The extent to which a dam will benefit navigation is not to be measured by its cost nor the motives which impel its construction. *Ibid.*

8. Where the public use justifies the erection of a dam, and the dam, in addition to subserving its public purpose, incidentally causes a surplus of water available for power and for private use, the public use is not thereby impaired or destroyed. *Ibid.*

9. Public-service corporations are at all times answerable to the state for nonfeasance or misfeasance in their obligations to the public. *Ibid.*

10. A corporation, authorized as an incident to improving a navigable river to construct a dam, cannot maintain such dam as an impediment to navigation or as only useful for generating power. *Ibid.*

11. In proceedings to condemn lands for flowage to be created by a dam to be erected in aid of navigation, the evidence failed to show that the dam was to be constructed or the land to be taken for any private use. *Held,* that the creation of an additional public use of generating and distributing power did not make unlawful the condemnation proceedings. *Ibid.*

NEGATIVE EVIDENCE. See EVIDENCE, 6–8.

NEGLIGENCE.

Acts and omissions constituting negligence. See EVIDENCE, 5. FIRES. HIGHWAYS, 4–6. INSTRUCTIONS TO JURY, 9. MASTER AND SERVANT, 2–26. MUNICIPAL CORPORATIONS, 17, 18. RAILROADS, 5–14.

Same: Statutory regulations.

1. The language of ch. 254, Laws of 1907, "In all cases under this act the question of negligence and contributory negligence shall be for the jury," in no way affects the judicial power of the court to determine the legal sufficiency of the evidence tending to prove the fact of negligence and contributory negligence. *Haring v. Great Northern R. Co.* 367

2. Under ch. 254, Laws of 1907, no jury question can arise unless the court first determines that the evidence adduced legally tends to prove such negligence. *Ibid.*

3. Where the trial court has properly determined that there is no evidence tending to show negligence or contributory negligence

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there is no question of fact thereby presented to be resolved by the jury, notwithstanding the language of ch. 254, Laws of 1907. *Ibid.*

4. Ch. 595, Laws of 1907, as to contributory negligence in certain cases, does not apply to any cause of action existing at the time of its enactment. *Clemons v. C., St. P., M. & O. R. Co.* 387

Same: Gross negligence. See BILLS AND NOTES, 4, 5.

Contributory negligence. See ELECTRICITY. FIRES, 3, 4. MASTER AND SERVANT, 4, 10, 14–20. MUNICIPAL CORPORATIONS, 17, 18. NEGLIGENCE, 1–4. RAILROADS, 5–11, 13, 14.

Actions: Pleading. See PLEADING, 3, 4, 9.

Same: Evidence.

5. In an action for negligent injury it is not error to admit testimony that plaintiff suffered an injury some years before, and experienced persistently thereafter symptoms similar to those of which he complained after the alleged injury to him by the defendant, since such testimony tends more or less directly to show that the physical condition under which he suffered might have been due to something other than defendant's negligence. *Wheeler v. Milner,* 26

Trial: Instructions.

6. In an action for negligent injury alleged to have been caused by defendant's attempt to drive his team past that of plaintiff, an instruction, stated in the opinion, is *held* to have been inapplicable to the situation on trial, but, in view of the rest of the charge, not to have materially misled the jury. *Wheeler v. Milner,* 26

7. In an action for personal injuries the court instructed the jury that they must determine whether defendant was exercising such care as a man of ordinary prudence would exercise under similar circumstances, "and if you find he was *not*, then you will find that he was in the exercise of ordinary care." *Held,* taking the instruction in its literal sense, that it was more favorable to defendant than if the word "not" had been omitted, and was not prejudicial. *Hiroux v. Baum,* 197

Same: Proximate cause. See MASTER AND SERVANT, 8.

8. An instruction to the jury stating that the proximate cause of an injury is its *direct* and natural cause is erroneous, but in this case is *held* not prejudicial, there being no evidence of an intervening event through which the negligence charged might or needed to be connected with the result, and the instruction having embodied also the necessity of the existence of reasonable anticipation. *Wheeler v. Milner,* 26

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. BROKERS, 1.

NEWSPAPERS.

1. Where a statute either directs or permits a publication at public expense, in the absence of language evincing a contrary intention such publication must be made in the legal language of the country. *Hyman v. Susemihl,* 296

2. The English language is the language of this country, to be used in all legal and official notifications and proceedings, in the absence of any statute authority to the contrary. *Ibid.*

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3. Under sec. 674*a*, Stats. (Supp. 1906), *held:*

(1) If a county board desires to make publication in a foreign language it must look to the statutes for authority to do so, and in the absence of such authority the right to make a contract for such publication does not exist.

(2) Sec. 675, providing what publications a county board may make in a foreign language and prescribing the conditions that must exist before such publications can be made, excludes publications in a foreign language other than those mentioned, including its proceedings. *Ibid.*

NEW TRIAL.

Grounds. See CRIMINAL LAW, 9.

In action of ejectment.

1. The ordinary motion to vacate a judgment and for a new trial during the term on account of error committed on the trial applies as well in actions of ejectment as in other actions, and hence the second or new trial provided by sec. 3092, Stats. (1898), is not exclusive. *Frost v. Meyer,* 255

Proceedings to procure new trial: Statement of grounds.

2. Where a statutory motion for a new trial is made it should state the grounds upon which the motion was based, at least as specifically as they are mentioned in the statute. *Beebe v. Minneapolis, St. P. & S. S. M. R. Co.* 269

Same: Notice.

3. Where a motion for a new trial has been made at the same term and before the entry of judgment, it is within the power of the court to vacate and set aside the judgment and grant a new trial without notice. *Frost v. Meyer,* 255

Same: Review. See APPEAL, 1, 3, 7, 22.

Terms: Presumptions.

4. Where it appears from the record upon which a motion for a new trial is based that the court might have ordered a new trial on account of errors not requiring the imposition of terms, it is presumed that it was granted for such errors. *Frost v. Meyer,* 255

5. Where a new trial is granted without costs and no grounds are stated in the order, the presumption is, nothing appearing in the record to the contrary, that it was granted for errors not requiring the imposition of terms. *Ibid.*

6. In so far as former decisions of the supreme court are in conflict with the foregoing rule they must be regarded as overruled. *Ibid.*

NONSUIT. See DISMISSAL AND NONSUIT.

NOTICE.

Of entry of judgment. See JUDGMENT, 5, 6.

Of exercise of option. See MUNICIPAL CORPORATIONS, 10, 11.

Of record of deed. See DEEDS, 7.

OFFICERS.

Corporate officers. See ESTOPPEL, 1–4. INSURANCE, 1, 3.

Per diem compensation: Splitting of days. See JUDGES.

1. While, as a general rule, under statutes allowing a *per diem* compensation to officers for services, a day cannot be split up, and the officer is entitled to a full day's pay if any time was

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occupied in the service, although the whole day is not consumed, the use of the words "for each day he shall be actually engaged" in the matter, is *held* indicative of an intention only to allow for time actually consumed. *Hoffman v. Lincoln County,* 353

2. Such construction necessitates a splitting up of days and a charge by the hour, and in the instant case, in the absence of any error assigned or argued upon the decision of the lower court that six hours constituted a day's work for a county judge, such decision is affirmed, without committing this court in any way upon the question as to the proper length of a judicial day. *Ibid.*

3. Where a statutory charge for an officer is limited to $5 per day it means a calendar day, and, where the number of hours constituting a day is fixed, such officer cannot, by working over hours, entitle himself to more than the *per diem* allowance for any one calendar day. *Ibid.*

OPINION EVIDENCE. See EVIDENCE, 18–21. TRIAL, 4.

OPTIONS. See MUNICIPAL CORPORATIONS, 10, 11.

OWNERSHIP of claim. See MUNICIPAL CORPORATIONS, 19–23.

PARENT AND CHILD. See HUSBAND AND WIFE, 4–9.

PAROCHIAL SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS, 2.

PAROL AGREEMENTS. See SPECIFIC PERFORMANCE.

PAROL EVIDENCE. See BILLS AND NOTES, 1. CONTRACTS, 8–10. EVIDENCE, 17. MUNICIPAL CORPORATIONS, 23. TRUSTS AND TRUSTEES.

PARTIES.

Real party in interest.

The rule that an objection that a suit was not brought by the real party in interest must be raised by demurrer or special pleading of the facts does not apply when the plaintiff has no interest, legal or equitable, in the claim or right to represent it. *Hilliard v. Wisconsin Life Ins. Co.* 208

Joinder. See ACTION, 2. APPEAL, 11. VENDOR AND PURCHASER, 11.

PARTNERSHIP. See EXECUTORS AND ADMINISTRATORS.

PAYMENT. See ASSIGNMENTS, 1. GARNISHMENT.

PENALTIES.

1. The authority to maintain a civil action for the recovery of a fine imposed by statute must be found, if at all, in sec. 3294, Stats. (1898), providing for the recovery of forfeitures by civil action. *State v. Hamley,* 458

2. Sec. 3294, Stats. (1898), in express terms excludes a "fine," and defines a forfeiture to be a penalty in money or goods "other than a fine;" and while the words "forfeiture," "fine," and "penalty" are often used interchangeably, a fine imposed as a punishment for the violation of a public statute of the state cannot be recovered in a civil action under sec. 3294, but the remedy is by a criminal prosecution in the name of the state. *Ibid.*

3. There is a distinction between fines imposed for breaches of municipal ordinances and those imposed by statutes of the state. *Ibid.*

4. While prosecutions for breaches of municipal ordinances are *quasi*-criminal, such breaches are not offenses against the state and therefore not punishable as such. *Ibid.*

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5. A criminal action is one prosecuted by the state against a person charged with a public offense committed in violation of a public law. *Ibid.*

6. The word "fine" in sec. 3294, Stats. (1898), is used in the same sense as the same word is used in sec. 2, art. X, Const. It does not include those forfeitures, sometimes called fines, imposed by municipal corporations for violation of their ordinances. *Ibid.*

PER DIEM COMPENSATION. See JUDGES, 2, 3. OFFICERS.

PERMANENT IMPROVEMENTS. See MORTGAGES, 1–4, 6. VENDOR AND PURCHASER, 15.

PERSONAL INJURIES. See DAMAGES, 11, 12. ELECTRICITY. EVIDENCE, 8. INSTRUCTIONS TO JURY, 9. MASTER AND SERVANT, 2–26. MUNICIPAL CORPORATIONS, 17, 18. NEGLIGENCE. PLEADING, 3, 4, 9. RAILROADS, 5–14. TRIAL, 5.

PERSONAL SERVICE. See PROCESS, 3.

PHYSICIANS AND SURGEONS. See CRIMINAL LAW, 6. STATUTES, 5.

PICKETING. See MASTER AND SERVANT, 27, 28.

PLEADING.

Construction: General rules.

1. In the construction of a pleading for the purpose of determining its effect its allegations should be liberally construed, with a view to substantial justice between the parties. *Jones v. Monson,* 478

2. Criticisms of a pleading will not support a challenge for insufficiency if sufficient can be discovered, reasonably, by judicial construction to sustain it. The sole test is, Will the language used permit of a reasonable construction which will sustain the pleading? *Ibid.*

Complaint. See ACTION. APPEAL, 27. HIGHWAYS, 5, 6. INDICTMENT AND INFORMATION. LIFE ESTATES, 1, 2. MASTER AND SERVANT, 28. TOWNS, 4.

3. In an action for personal injuries brought by the guardian *ad litem* of a minor, the allegations of negligence in the complaint, stated in the opinion, are *held* sufficient, in the absence of any objection before verdict. *Phillips v. Portage Transit Co.* 189

Same: Prayer for relief.

4. In an action for personal injuries the complaint was not served with the summons, and never served upon the defendant, and the prayer for relief, instead of closing with the usual demand for damages, contained the phrase "in all to his damages five thousand dollars." Judgment was entered on default, and on motion to set aside the judgment it was insisted that the complaint contained no demand for relief within the calls of sec. 2646, Stats. (1898). *Held,* whether such prayer would have been sufficient in a case where the complaint had been served with the summons and judgment taken by default—a point not decided—the defendant was in no way prejudiced, and hence under sec. 2829, Stats. (1898), the defect, if any, should be disregarded. *Phillips v. Portage Transit Co.* 189

Plea in abatement. See INDICTMENT AND INFORMATION, 1.

Estoppel. See ESTOPPEL, 5.

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Counterclaim. See PLEADING, 14–17.

Reply. See PLEADING, 14–17.

General denial: Proofs admissible. See PLEADING, 15.

5. The fact that no cause of action existed at the time of the commencement of the suit may be established under a general denial. *Hilliard v. Wisconsin Life Ins. Co.* 208

6. Any fact which the plaintiff must prove to establish his cause of action may be disproved under a general denial. *Ibid.*

Demurrer. See ACTION, 2. APPEAL, 11, 12, 14, 27. INDICTMENT AND INFORMATION. INJUNCTION, 1. PARTIES. SALES, 1. TOWNS, 4.

Same: Premature commencement.

7. The rule that an objection that the action was prematurely brought must be raised by demurrer or answer specially pleading the facts applies only where the cause of action was complete before suit but there was nonperformance of some condition of its being remediable, not to where there was no such cause at the beginning. In the latter situation the objection may be raised, as in any other case of there being insufficient facts pleaded or established to make out a cause of action. *Hilliard v. Wisconsin Life Ins. Co.* 208

Same: Pleading over.

8. An order overruling a demurrer to a complaint providing that "plaintiff have judgment therein, but with leave to the defendants to withdraw their demurrer and put in an answer within twenty days," gives leave to the defendants to withdraw their demurrer if they choose and also gives leave to answer over, which latter right is not dependent upon the demurrer being withdrawn, and is not erroneous in requiring the withdrawal of the demurrer as a condition precedent to interposing an answer. *Hyman v. Susemihl,* 296

Amendment. See INJUNCTION, 1. PLEADING, 16, 17.

Amendment at the trial: Terms.

9. In an action for personal injuries the defendant's negligence, by the allegations of the complaint, was predicated upon defects in the machine in which plaintiff was injured. On the trial no defect in the machine was shown, and at the close of plaintiff's evidence, defendant having moved that the plaintiff be nonsuited, plaintiff asked leave to amend his complaint, presenting an amended complaint, which was the same as the original complaint except that therein the negligence of defendant was predicated upon the ignorance and inexperience of the plaintiff, known to the defendant, and the failure of the defendant to instruct or warn the plaintiff before or at the time of placing plaintiff to work. *Held,* that it was proper to allow such amendment on the trial and there was no error in such ruling. *Rahles v. J. Thompson & Sons Mfg. Co.* 506

10. In such case it is not error to refuse a continuance of the case over the term, where there is no showing, either by an affidavit or by a statement to the court based on the pleadings apparently supporting such statement, that the defendant was unprepared to meet and could not, with the evidence at hand or available, meet the issues raised by the amended complaint. *Ibid.*

11. The terms on which amendment of pleadings during the trial, which bring about no radical change of the issues, may be allowed, are in the discretion of the court. *Ibid.*

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Verification.

12. A guardian *ad litem* verifies as a party and the rules respecting verification by a party apply; and hence, if the guardian *ad litem* verifies a complaint positively and of his own knowledge, it is properly verified. *Phillips v. Portage Transit Co.* 189

Issues, proof, and variance.

13. Under a complaint for goods sold and delivered at an agreed price plaintiff is at liberty to show any contract of sale, oral or written, under which the goods in question were delivered. *Brooklyn Creamery Co. v. Friday,* 461

14. Where, in answer to such a complaint, the defendant pleaded by way of counterclaim that the contract was such as to require further deliveries, which plaintiff had failed to make, if the plaintiff wished to rely upon a modification of the contract and default of the defendant in performing the contract so modified sufficient to excuse further deliveries, strictly the reply should have pleaded such modification. *Ibid.*

15. In such case, however, a general denial in the reply put in issue the existence of the contract pleaded in the counterclaim, and it was therefore no material variance to admit evidence of the modification in explanation or justification of the plaintiff's refusal to make further deliveries. *Ibid.*

16. In such case, the action having been tried before a referee, in the absence of any request in that behalf it is too late to allege in the supreme court for the first time that, had defendant been apprised by the pleadings before trial of the claim that the contract had been modified, he could have secured an important witness to the contrary. *Ibid.*

17. In such case an amendment of the pleadings to conform to the proof is *held* proper. *Ibid.*

POLICE POWER. See MASTER AND SERVANT, 6. MUNICIPAL CORPORATIONS, 5.

POSSESSION. See LIFE ESTATES, 6.

PRAYER FOR RELIEF. See PLEADINGS, 4.

PREFERENCE. See BANKRUPTCY, 1–12. FRAUDULENT CONVEYANCES.

PRELIMINARY INJUNCTION. See INJUNCTION.

PRESENT SECURITY. See BANKRUPTCY, 4.

PRESUMPTIONS. See APPEAL, 15, 26. ARBITRATION AND AWARD, 2. BANKRUPTCY, 11. CORPORATIONS, 1. EMINENT DOMAIN, 5. EVIDENCE, 1–3. HUSBAND AND WIFE, 1. JUDGMENT, 5. NEW TRIAL, 4, 5.

PRINCIPAL AND AGENT. See CONTRACTS, 11. ESTOPPEL, 1–4. MASTER AND SERVANT, 1, 21–24. SIGNATURES. WITNESSES, 2.

PRIORITY. See BANKRUPTCY, 9.

PRIVATE LAWS. See CONSTITUTIONAL LAW

PRIVITY. See INSURANCE, 15.

PROCESS.

Service: Personal service: Foreign corporations.

1. Under subd. 13, sec. 2637, Stats. (1898), providing that service of summons on foreign corporations not otherwise specified may be made upon any agent having charge of or conducting

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any business for such corporation within the state, the captain of a vessel of a corporation plying on the Great Lakes and stopping to receive or discharge cargo at ports within this state is an agent within the calls of the statute. *Phillips v. Portage Transit Co.* 189

2. Where service of a summons is properly made upon the captain of a vessel plying on the Great Lakes and stopping to receive or discharge cargo at ports within the state, it is unnecessary, on an application to set aside the service of the summons, to consider the effect of a general appearance. *Ibid.*

3. In an action against a corporation, where the service of the summons has been made upon an agent designated by the statute as a proper person upon whom service could be made, the service is personal within the meaning of the statute authorizing entry of judgment by default. *Ibid.*

PROMISSORY NOTES. See BILLS AND NOTES. BROKERS, 1.

PROPOSALS. See CONTRACTS, 6.

PROXIMATE CAUSE. See MASTER AND SERVANT, 8. NEGLIGENCE, 8.

PUBLICATIONS. See NEWSPAPERS.

PUBLIC BENEFIT. See NAVIGABLE WATERS, 3.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 2–14.

PUBLIC-SERVICE CORPORATIONS. See NAVIGABLE WATERS. RAILROADS, 1. TAXATION, 1.

PUBLIC USE. See NAVIGABLE WATERS, 3, 8.

PUNITORY DAMAGES. See DAMAGES, 1. INDIANS, 5.

PURCHASER IN GOOD FAITH. See BILLS AND NOTES, 4, 8.

RAILROAD COMMISSION. See RAILROADS, 1–4.

RAILROADS.

Incorporation: Amendment of articles of incorporation. See CORPORATIONS, 2–6.

Railroad Commission.

1. The leading idea of sec. 1753—3, Stats. (Laws of 1907, ch. 576), is that a public-service corporation shall not do any of the things conditionally prohibited except upon the authority of the Commission first obtained; the word "authority" not being used as suggestive of a delegation of power to determine what the corporation may do within its corporate powers, but of authority to determine whether the thing proposed to be done is within such powers. *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 80

2. The legislature cannot properly delegate authority to a commission to determine what power a corporation shall possess. It may clothe a commission with authority to determine whether the facts exist rendering the corporation competent to exercise its corporate powers in a given case. *Ibid.*

3. A legislative grant of authority to a commission to determine whether a corporation may do a particular thing proposed by the latter to be done implies authority to determine corporate competency in that regard tested by the charter. *Ibid.*

4. The Railroad Commission of this state has authority under sec. 1753—3, Stats. (Laws of 1907, ch. 576), to pass upon the com-

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petency of a railroad corporation to increase its capital stock and to refuse permission in that regard in case the articles of incorporation shall not have been so broadened as to cover the subject by a valid amendment which requires a public record of the change to be made in the office of the secretary of state and compliance with the conditions precedent thereto in respect to the payment of fees. *Ibid.*

Right of way. See EMINENT DOMAIN. EVIDENCE, 18–20.

Taxation. See TAXATION, 1, 3.

Injuries at crossings.

5. In an action for personal injuries sustained at a railroad crossing, it is *held*, under the evidence, that the plaintiff had an opportunity to look and listen while traveling over the fifty-three feet which intervened between the point where he stopped, looked, and listened and the nearest rail of the track, and that, although his attention was diverted by the spirited team he was driving, it was not irresistibly diverted, and hence that he was guilty of contributory negligence. *Smith v. Chicago, M. & St. P. R. Co.* 97

6. Mere diversion of attention will not justify failure of a person about to cross a railroad track upon a highway to seasonably look and listen to discover presence in dangerous proximity of an approaching train. Failure to see such train and keep out of its pathway, when there is opportunity for doing so, is only excusable where attention is irresistibly forced to something else. *Clemons v. Chicago, St. P., M. & O. R. Co.* 387

7. The presence of a railway track is such an admonition of probability of danger to one entering thereon that nothing short of physical impossibility will excuse neglect of a traveler to use his senses of sight and hearing to discover whether a train is dangerously near or not before entering upon such track. *Ibid.*

8. In case of a train being in sight and coming towards a highway crossing of a railway track, as a traveler approaches intending to make the crossing, the duty to look and listen and keep out of the pathway of such train is not excused by any regulation as to the legal rate of speed of trains. *Ibid.*

9. Assumption as to the speed of a moving train because of a legal regulation may be indulged in when the train is not in sight but not otherwise. *Ibid.*

10. Where a person approaching a highway crossing of a railway track has ample opportunity for seeing and keeping out of the pathway of a coming train by exercising the care required of him in respect thereto as matter of law, and nevertheless places himself in such pathway and is killed, leaving no eye-witness of the circumstances thereof, such facts unexplained establish contributory negligence upon the doctrine of *res ipsa loquitur.* *Ibid.*

Injuries to employees.

11. In an action for injuries received by a car-repairer while repairing a car, by reason of the negligent operation of an engine upon the same track, the plaintiff is *held*, upon the evidence, to have been guilty of contributory negligence. *Jacoby v. Chicago & N. W. R. Co.* 131

12. The construction of a railroad platform in such manner that the position of a car on a curve leaves an open space between the

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ends of the car and the edge of the platform, which naturally might invite employees to occupy such space and lead them to believe they were in a safe place, does not render the appliance defective and unsafe. *Ibid.*

13. The fact that the ends of a car in passing over a curve would be farther away from a platform than the points between the ends is a natural condition which an employee, as a reasonably intelligent person, must be presumed to know and note, and omission to do so was an act of negligence. *Haring v. Great Northern R. Co.* 367

14. In an action for negligent injury causing death of a servant by being crushed between a moving freight car and a railroad platform, it is *held* under the evidence that there was no duty on the part of the master to warn the servant of the peril complained of, and that the servant was guilty of negligence in assuming such place of danger to perform his duty. *Ibid.*

REAL PARTY IN INTEREST. See PARTIES.

REAL PROPERTY. See APPEAL, 24. ARSON. BANKRUPTCY, 1–3. DEEDS. DESCENT AND DISTRIBUTION, 2. EMINENT DOMAIN. FIRES. HIGHWAYS. JUDGMENT, 4. LIFE ESTATES. SPECIFIC PERFORMANCE. SUBROGATION. TAXATION. TAX TITLES. TRUSTS AND TRUSTEES. VENDOR AND PURCHASER.

REBUTTABLE PRESUMPTIONS. See HUSBAND AND WIFE, 1.

RECORDING OF INSTRUMENTS. See BANKRUPTCY, 3. DEEDS, 7.

REDEMPTION. See MORTGAGES.

REGISTRATION OF BIRTHS. See CRIMINAL LAW, 6.

REMAINDERS. See LIFE ESTATES, 3–6. LIMITATION OF ACTIONS, 2. TRUSTS AND TRUSTEES, 3. WILLS, 7–13.

REPEAL OF STATUTES. See MUNICIPAL CORPORATIONS, 1.

REPLY. See PLEADING, 14–17.

REQUESTS FOR INSTRUCTIONS. See EMINENT DOMAIN, 8. INSTRUCTIONS TO JURY, 10, 11.

RES ADJUDICATA. See APPEAL, 27. ARBITRATION AND AWARD, 1. JUDGMENT, 3–6.

RESCISSION. See INSURANCE, 7–12. VENDOR AND PURCHASER, 9, 10, 15.

RES GESTÆ. See EVIDENCE, 5.

RETAINER. See ATTORNEY AND CLIENT, 1.

REVOCATION.
Of continuing offer. See CONTRACTS, 3–5.
Of license. See INTOXICATING LIQUORS, 3, 4.

RIGHT OF WAY. See EMINENT DOMAIN.

RULES OF COURT.
Supreme Court Rule 51 (Disrespectful conduct of counsel), 507, 517.

SAFE PLACE TO WORK. See MASTER AND SERVANT, 6–10.

SALARIES. See JUDGES. OFFICERS.

SALES.

Executory contracts: Construction: Rights of parties.

1. Where the gravamen of a complaint is to recover the purchase price of goods on an executory contract of sale, and the complaint clearly states a good cause of action for that purpose, on

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demurrer no construction is permissible which would make incidental provisions of the contract, plainly intended to secure performance of the principal obligation, paramount to such principal obligation. *Hartman F. & C. Co. v. Krieger*, 650

2. An executory contract for the sale of household goods, which authorizes the seller to apply partial payments as rent and, at the same time, retake and resell the goods and refuse to account for the proceeds of such sale over and above the balance due upon the contract, even if incapable of enforcement, does not prevent the collection of the unpaid purchase money by an action at law, where the goods have not been retaken and are in the possession of the purchaser. *Ibid.*

Modification of contract.

3. In an action on a contract for the sale of ice, a finding that the contract was modified by mutual agreement as to delivery of the full amount within the agreed time, is more in the nature of a conclusion of law than one of fact. *Anderson v. Savoy*, 44

Performance of contract: Breach. See APPEAL, 19–21. CONTRACTS, 18–21.

Same: Waiver. See CONTRACTS, 18–21.

4. Plaintiff, under a contract for the sale of 400 tons of ice to be loaded for shipment from time to time as demanded by plaintiff between April 1 and October 1, ordered ice and received and used the same notwithstanding defendant had breached the agreement by failing to ship two cars a week as demanded and to pack that which was shipped in the manner agreed upon, and the defendant continued to ship ice within a reasonable time on orders notwithstanding plaintiff had not paid for prior shipments according to contract. *Held*, that it was not a necessary inference from such circumstances that plaintiff waived the provisions of the agreement entitling him to the full amount, or that the minds of the parties met as to such waiver. *Anderson v. Savoy*, 44

5. While plaintiff's demand for and receipt and appropriation of ice without objection, notwithstanding the breach, bound him to pay for what he obtained, it did not necessarily affect his right to damages caused by the delay in shipping according to the demand of two cars per week or for failure to seasonably forward to the full amount, and his conduct in that regard and defendant's consent to ship ice notwithstanding the delayed payments are perfectly consistent with plaintiff's retention of such right. *Ibid.*

Evidence. See PLEADING, 13, 14.

SCHOOLS AND SCHOOL DISTRICTS.

1. Where plaintiffs and all other taxpayers of a school district have been cognizant of the manner of conducting a district school, and the electors of the district each year have been informed that money had been spent for the purpose of maintaining sectarian instruction, and, without protest from any, at each annual meeting directed like expenditures for the ensuing year, and, on the faith of such acquiescence, believing that the taxpayers approved, the school district officers parted with the district's money, plaintiffs at least cannot equitably ask that such officers be compelled to repay the amounts expended. *Dorner v. School District*, 147

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2. Under secs. 423, 430, Stats. (1898), and the affirmative grant of powers therein contained, fairly and reasonably construed, a school district may maintain a common school in a parochial school building and its discretion in that regard should not be controlled by the courts. *Ibid.*

SEALS.

See SIGNATURES.

1. Contracts under seal, executed by private persons, are governed by sec. 4220, Stats. (1898), permitting actions to be brought on such instruments within twenty years after the cause of action has accrued. *Mariner v. Wiens,* 637

2. As a general rule sealed instruments, including contracts of parties, regardless of their nature, provisions, or purposes, are specialties within the limitation statutes. *Ibid.*

SECTARIAN INSTRUCTION. See SCHOOLS AND SCHOOL DISTRICTS, 1.

SELF-DEFENSE. See HOMICIDE, 9.

SERVICE OF PROCESS. See PROCESS.

SET-COLLAR. See MASTER AND SERVANT, 8.

SETTLEMENT OF CRIME. See EMBEZZLEMENT, 3.

SEWERS. See MUNICIPAL CORPORATIONS, 4.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 1.

SIGNATURES.

A finding that a written agreement in issue was in fact executed and delivered by the parties as a sealed instrument is sufficiently supported as to plaintiff by testimony that it was executed by plaintiff's son in plaintiff's presence and at his immediate parol direction, although no authority under seal from plaintiff to his son is shown. *Mariner v. Wiens,* 637

SNOW. See HIGHWAYS, 5, 6.

SPECIAL ASSESSMENTS. See ACTION. MUNICIPAL CORPORATIONS, 4–9. TAXATION, 1, 3.

SPECIAL VERDICT. See APPEAL, 5, 6, 13. BROKERS, 2. MASTER AND SERVANT, 15–18, 25. TRIAL, 8–11.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 2, 6.

1. Specific performance of an oral agreement for a mortgage cannot be enforced where there is failure to specify any time when the mortgage was to mature and be payable. *Poole v. Tannis,* 363

2. In an action to enforce specific performance of an alleged oral agreement for a mortgage to secure moneys advanced by plaintiff to defendant, where there could be no such relief granted because the evidence failed to establish a sufficiently certain and definite contract to mortgage, the claim sought to be enforced not arising out of a transaction between vendor and vendee and the facts clearly negativing such a relationship, it is error to award plaintiff a vendor's lien. *Ibid.*

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3. In such case under the evidence, stated in the opinion, it is *held* that plaintiff is entitled to a judgment giving her an equitable lien on the premises in question and ordering a sale thereof if the defendant failed to satisfy such judgment by payment of the amount due with costs. *Ibid.*

STANDING TIMBER. See DAMAGES, 5–7. EVIDENCE, 5. FIRES, 3, 4. TRIAL, 2, 3.

STARE DECISIS. See BANKRUPTCY, 14.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. CRIMINAL LAW, 7. NEGLIGENCE, 4.

Private or local. See CONSTITUTIONAL LAW.

Mandatory or directory. See JUSTICES' COURTS, 2.

Construction. See APPEAL, 2, 6. ARSON, 1. ATTORNEY AND CLIENT, 2. BANKRUPTCY, 3, 7, 8, 13, 14. BILLS AND NOTES, 4. CHATTEL MORTGAGES, 2, 3. CONTRACTS, 1, 2. CORPORATIONS, 2, 4, 6. COURTS, 1, 2. CRIMINAL LAW, 3, 6, 7, 9, 11. DISCOVERY, 1, 4, 6–9. EVIDENCE, 11–16. EXECUTORS AND ADMINISTRATORS, 1. HIGHWAYS, 4–6. INSTRUCTIONS TO JURY, 9. INSURANCE, 14. INTOXICATING LIQUORS, 3. JUDGES. JUDGMENTS, 6. JUSTICES' COURTS. LIMITATION OF ACTIONS. LOGS AND LOGGING, 2. MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 1–4, 6, 9. NAVIGABLE WATERS, 1. NEGLIGENCE, 1, 2, 4. NEWSPAPERS, 1, 3. NEW TRIAL, 1. PENALTIES, 1, 2, 6. PLEADING, 4. PROCESS, 1. RAILROADS, 1, 4. SCHOOLS AND SCHOOL DISTRICTS, 2. SEALS, 1. TAXATION, 3. TOWNS, 1. TRUSTS AND TRUSTEES, 1, 3. WILLS, 1–3. WITNESSES, 1.

Construction.

1. The legislative intent in passing a law governs as to the scope thereof whether such intent is unambiguously expressed or is discoverable by the aid of rules for judicial construction. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Comm.* 80

2. The rules for judicial construction permit of looking at a legislative enactment as a whole, to the subject with which it deals, to its reason and spirit, of giving words a broad or narrow construction, going either way to the limits of their reasonable scope, of supplying omitted words clearly in place by implication, of changing one word for another in case of the wrong one being clearly used, and of thus reading out of the enactment and giving effect to the real intent though it may be found to be contrary to the letter thereof. *Ibid.*

3. For the purpose of clearing up obscurities in a legislative act it should be read with reference to the leading idea thereof, that being regarded as such limitation upon particular words or clauses and expansion of others, within the scope thereof, in connection with that of words clearly implied, and the law be thus, if reasonably practicable, brought into harmony with such idea. *Ibid.*

4. A law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal. *Brown v. State.* 543

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Same: Time of taking effect.

5. Ch. 469, Laws of 1907 (secs. 1022—1 to 1022—59, Stats.), which, among other things, denounces a penalty upon any physician who, on or before October 1, 1907, shall fail to register his name, address, and occupation with the "local registrar" of the district in which he resides, took effect from and after October 1, 1907. The same statute created the office of local registrar. *Held*, that until October 2, 1907, there was no "local registrar" in existence, and hence a compliance with the only command of the statute with reference to registration was impossible. *Brown v. State*, 543

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STREETS. See MUNICIPAL CORPORATIONS, 2–9, 18.

SUBCONTRACTOR. See MECHANICS' LIENS.

SUBROGATION.

1. Subrogation is based on rules of equity. It is a creation of the law whereby the substantial ends of justice may be accomplished regardless of contract relations. *Poluckie v. Wegenke*, 433

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2. Where a person for the protection of his title to property is compelled to pay off a lien thereon for a debt for which he is not liable, so that another having an interest in the property and who stands prior in obligation to pay the debt, either because of being the debtor or being more immediate to the creator of the lien, will be relieved of the burden, equity immediately operates in favor of the payor, preserving the lien for his protection to the extent that he would otherwise suffer loss to such other's gain. *Ibid.*

3. In an equitable action to have a forfeiture declared of rights obtained by P., a grantor of appellant, under a conveyance to the grantor by his parents (the plaintiff and her husband now deceased) to secure their support for the balance of their lives, it is *held* that there was nothing in the transactions between appellant and his grantor, stated in the opinion, upon which right of subrogation could be grounded. *Ibid.*

SUBSTANTIAL PERFORMANCE OF CONTRACT. See CONTRACTS, 14–17.

SUMMONS. See PROCESS.

SUPERVISORY CONTROL. See MANDAMUS, 2, 4, 5.

SURRENDER VALUE. See INSURANCE, 13, 14.

SURVEYS. See EVIDENCE, 3.

TAXATION.

Mode of assessment of public-service corporations.

1. The principle that the franchises of a public-service corporation, together with the property owned by it which is necessary for its use in order to accomplish the purposes of its existence, constitute an entirety which is not ordinarily subject to division by sale of a part on court or tax process, applies to railroads, but is subject to the exception that such sale and division may be authorized by special legislative authority. *Chicago, M. & St. P. R. Co. v. Janesville,* 7

2. Ordinary statutory provisions, merely general in their nature, will not be construed to apply to such property. *Ibid.*

3. Ch. 425, Laws of 1903, is an express and unambiguous declaration of legislative purpose to subject the property of a railroad to special assessments, although such property is a part of the entirety. *Ibid.*

Remedies for wrongful enforcement: Taxpayers' actions. See ACTION. MUNICIPAL CORPORATIONS, 4–9.

TAX TITLES.

See LIFE ESTATES. LIMITATION OF ACTIONS, 1. VENDOR AND PURCHASER, 14.

Rights under tax certificate.

1. The holder of a tax certificate, if in fact held adversely, has an equitable title to the lands. *Curtis L. & L. Co. v. Interior L. Co.* 341

2. A tax certificate imports, while outstanding, an absolute and paramount right, subject only to the right of redemption, and constitutes an incumbrance upon the land and a cloud upon the title. *Ibid.*

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TENDER.

1. Where one who is under a legal duty to convey property to another, wrongfully, though in good faith, refuses to do so, a court of equity will treat the property as belonging to the grantee after the time at which it ought to have been transferred, and will treat the wrongdoer as a trustee thereof for the purchaser's benefit, liable to account at least for the profits actually received. *Eau Claire v. Eau Claire Water Co.* 517

2. In such case, if the grantee has enjoyed the use of the purchase money, or, indeed, has by his act deprived the grantor of such use, the grantor's duty to account for profits should be abated to that extent. *Ibid.*

3. In such case, where the purchase money has been tendered, and has been so appropriated to the purposes of the tender that the purchaser has received no benefit therefrom meanwhile, and the failure of the seller to receive it and enjoy its use is due wholly to his own fault, the loss of interest which such money might have earned if put to use should not fall upon the purchaser. *Ibid.*

4. Where a municipality, after having made an actual and manual tender of money on its indebtedness, sets apart and appropriates the money to the debt, and places it in the hands of its treasurer as a special fund which the debtor can receive at any time, it is such compliance with the rules governing tender as to be effective to stop interest. *Ibid.*

TERMS OF COURT. See COURTS, 2–5. NEW TRIAL, 3.

TIMBER. See DAMAGES, 5–7. EVIDENCE, 5. FIRES, 3, 4. LOGS AND LOGGING, 9. TRIAL, 2, 3.

TOWNS.

Creation and alteration: Adjustment of assets and liabilities.

1. Under sec. 672, Stats. (1898), the power and duty is imposed on the county board to ascertain and determine the amount the town to which detached territory is annexed is entitled to receive from the other town as the share of the latter's credits apportionable to the detached territory upon the basis of apportionment prescribed. *Emery v. Worcester,* 281

2. Such ascertainment by the county board is a condition precedent to the existence of any right enforceable in court to the share of the credits of the old town, since no right to any such share exists at common law and independent of this very statute. *Ibid.*

3. In such case an attempted remission or delegation of the duty imposed on the county board to the two town boards is no compliance with the statute. *Ibid.*

4. In such case where the complaint fails to allege such precedent action by the county board a demurrer should be sustained. *Ibid.*

TRANSACTIONS WITH DECEDENTS. See DEEDS, 1. EVIDENCE, 13. WITNESSES, 1, 2.

TRESPASS. See CHATTEL MORTGAGES, 2, 3. LOGS AND LOGGING, 2.

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TRIAL.

Reception of evidence. See APPEAL, 9. ARBITRATION AND AWARD, 4, 5. DAMAGES, 5. EMINENT DOMAIN, 1–4. EVIDENCE, 5, 11–16. INDICTMENT AND INFORMATION, 1. LOGS AND LOGGING, 1. MUNICIPAL CORPORATIONS, 23. NEGLIGENCE, 5. PLEADING, 5, 6, 13, 15. WITNESSES.

Same: Reopening the case.

1. It is within the discretion of the trial court to permit a plaintiff, who has rested, to introduce further evidence. *Murphy v. Herold Co.* 609

Same: Objections and motions to strike out. See APPEAL, 9.

2. In an action to recover damages resulting to plaintiff's standing timber by reason of a fire alleged to have been negligently set on defendants' land, plaintiff, on cross-examination, admitted that there was a custom at an early day to burn over both pasture and timber land, but directly denied the existence of such custom for some years before the fire, where pasture and timber joined, which evidence was stricken out. *Held*, irrespective of the question whether evidence of custom would be competent, that there was no prejudice to defendants in striking out the testimony. *Miller v. Neale,* 426
3. In an action to recover damages for loss to standing timber destroyed by fire, plaintiff's admission that his statement as to the damage to the trees was a mere guess is *held* to mean a rough estimate and not an accurate judgment based on careful measurement, and hence no error was committed in refusing to strike out his testimony on that subject. *Ibid.*
4. Where there was positive evidence that an elevator bell rang and that the witness could have heard it, but he testified that he did not, it is harmless error to sustain objections to questions involving mere opinions as to the witness's ability to hear the bell which were as capable of being formed by the jury as the witness. *Anderson v. Horlick's M. M. Co.* 569

Arguments and conduct of counsel.

5. In an action for personal injuries to a servant, remarks of plaintiff's counsel, in the presence of the jury, to the effect that a certain insurance company stood back of the defendant in the case, having been uttered in an argumentative objection to a proposal by defendant, and not as a deliberate offer of evidence, and having been disapproved by the trial court in the presence of the jury, are *held* not to be ground for reversal. *Wankowski v. Crivitz P. & P. Co.* 123
6. Error assigned to arguments of counsel, stated in the opinion, is *held* to be too critical. *Rahles v. J. Thompson & Sons Mfg. Co.* 506

Taking case or question from jury. See CONTRACTS, 9. FIRES, 4. INDIANS, 5, 6. MASTER AND SERVANT, 19, 20. NEGLIGENCE, 1–4.

Same: Direction of verdict. See APPEAL, 2, 3, 7. EMINENT DOMAIN, 9.

Hearing by court: Findings. See APPEAL, 4–18.

7. A specific finding directed to the special question of the time of payment of specific notes is *held* controlling over the mere recapitulation of these notes with others contained in another finding. *Claridge v. Evans,* 218

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Special verdict. See APPEAL, 5, 6, 13. BROKERS, 2. MASTER AND SERVANT, 15–18, 25.

8. Where an affirmative answer is given to a question of a special verdict: "Had the plaintiff the right to and did he understand that said order included the machinery in said box?" the question is not open to criticism as being double, although had the question been answered in the negative there might have been some ground for criticism. *Wankowski v. Crivitz P. & P. Co.* 123

9. In an action to recover on a contract for personal services, the special verdict, stated in the opinion, is *held* to have sufficiently covered the case to save the judgment from being disturbed for prejudicial error as to the form of the verdict. *Larson v. Foss,* 304

10. A finding of a special verdict, in an action for personal services, that plaintiff worked a specified number of days as foreman, he having been originally hired as a common laborer, is *held* to have sufficiently informed the court how long plaintiff worked at the second employment, where the necessary inference from the findings, with the undisputed evidence, was that all the work defendant did as foreman was under the second contract. *Ibid.*

11. A special verdict which submits all the essential facts is not erroneous because it fails to submit one issue by a separate question. *Murphy v. Herold Co.* 609

Correction of errors. See APPEAL, 23.

TRUSTEE IN BANKRUPTCY. See BANKRUPTCY, 1, 3, 12.

TRUSTS AND TRUSTEES.

See TENDER, 1.

1. A deed of land, absolute in form, to which is annexed a parol trust, void by the provisions of secs. 2302, 2304, Stats. (1898), is not absolutely void, nor voidable at the suit of the heir of the grantor, if the trustee observes the terms and executes the trust itself or executes a written declaration of trust. *Schumacher v. Draeger,* 618

2. An answer, verified and filed by the grantee in a deed, in a suit by the heir of the grantor to set the deed aside, admitting the terms and offering to execute a parol trust, is a sufficient written declaration of trust binding upon the grantee and available to the beneficiaries. *Ibid.*

3. A conveyance to a trustee to the use of A. for life and thereafter to B., imposing no active duties upon the trustee, is within the calls of sec. 2073, Stats. (1898), and vests an absolute legal estate in A. for life, with remainder to B. *Ibid.*

UNDUE INFLUENCE. See EVIDENCE, 4.

UNLAWFUL DETAINER. See JUSTICES' COURTS, 1.

USAGE AND CUSTOM. See TRIAL, 2.

VACATING JUDGMENTS. See APPEAL, 15. JUDGMENT, 1, 2.

VALUE. See ARBITRATION AND AWARD, 7, 8. EMINENT DOMAIN. EVIDENCE, 18–20.

VARIANCE. See PLEADING, 15.

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VENDOR AND PURCHASER OF LAND.

Requisites and validity of contract. See DEEDS, 2–6.

1. It is the settled law of Wisconsin that a valid and binding contract for the sale of real estate may be made through the medium of letters. *Curtis L. & L. Co. v. Interior L. Co.* 341
2. In case of a breach of such a contract on the part of the vendor, the vendee may enforce specific performance, and, in the event of a breach on the part of the vendee, the vendor may maintain an action to recover the purchase price. *Ibid.*
3. The promise to pay on the part of a vendee of lands is a sufficient consideration for the agreement to sell by the vendor. *Ibid.*
4. In case of a contract to sell lands, evidenced by letters, the letters must contain all the elements necessary to constitute an unambiguous contract. Among other things there must be a definite offer to sell on the part of the owner of the land and an unqualified acceptance of such offer on the part of the purchaser. *Ibid.*
5. In case of a contract to sell lands, evidenced by letters, the vendee in his letter of acceptance cannot attach any condition to his acceptance, even to the extent of undertaking to dictate the place where payment shall be made. If the attempted acceptance is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance but a counter proposition. *Ibid.*
6. Where the letter of acceptance contains a mere suggestion or request that payment be made at a particular place, but such request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell and will not defeat an action for specific performance. *Ibid.*
7. Defendant offered by letters to sell the SW SW 6–35–8, to which plaintiff replied, "We will take your SW SW 6–35–8, Lincoln county, Wisconsin." *Held*, that the ambiguity as to the location of the land contained in defendant's offer was made certain by plaintiff's letter, which attached no condition to his acceptance, there being no claim of any misunderstanding as to the lands intended. *Ibid.*
8. A statement in a letter accepting an offer to sell lands: "If it is just as satisfactory to you, will you please send your deed to [a bank named] for collection," is a mere suggestion or request, and not an attempt to impose a condition not in consonance with the offer. *Ibid.*

Construction and operation of contract.

9. A contract under which defendants deeded farm lands to plaintiffs in consideration of support provided, among other things, that the defendants should have three rooms in the house with plaintiffs on the farm, but, in case they should desire to live with one of their other children, articles required to be delivered to defendants under the contract were to be delivered at the abode of the defendants, which should not be more than twenty miles from the farm, and, "should the parties concerned not agree," then the plaintiffs should pay the defendants $1,000 "and be released from all other obligations." *Held*, in view of the close connection between the provision relating to the payment of the $1,000 and the language respecting failure to

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agree, that the idea of payment was coupled with the failure to agree after removal from the farm and the new conditions arising after the defendants had gone to live with other children, and hence the right to pay and be released arose only under such circumstances. KERWIN, TIMLIN, and BARNES, JJ., dissenting, are of the opinion that any failure to agree, whether the defendants remained under the plaintiffs' roof or not, entitled the plaintiffs to pay the $1,000 and be released from all further obligations to the defendants. *Mootz v. Petraschefski*, 315

10. In such case, plaintiffs having breached the contract before they commenced the instant action for leave to pay into court the $1,000 and for judgment declaring the contract satisfied, the defendants' right to rescission was complete and they were entitled to enforce such right under their counterclaim. *Ibid.*

11. Under such contract plaintiffs having also agreed to pay to a daughter of defendants, upon her arriving at the age of eighteen years, $450, it is *held* that the daughter should have been made a party and permitted to defend, so that she might be bound by the judgment. *Ibid.*

Same: Sale at sound price: Agreement for good and sufficient conveyance: Implied covenants.

12. An agreement to sell land at a sound price, without reservation or exception, implies that a marketable title free of incumbrances will be passed to the vendee upon compliance with his obligations. *Curtis L. & L. Co. v. Interior L. Co.* 341

13. Under an agreement by a vendor of lands to execute a good and sufficient conveyance the purchaser may demand a clear title as well as that it be assured him by proper covenants. *Ibid.*

14. A vendee of lands, without reservation as to title, has the right to insist that outstanding tax certificates be redeemed, and by so doing adds nothing to the obligation the vendor assumed when his offer was accepted. *Ibid.*

Remedies of purchaser: Rescission: Improvements.

15. Where, pending a contract for support in consideration of a conveyance of lands, the vendee made permanent improvements with the vendor's consent, on rescission of the contract on account of the vendor's breach of a condition subsequent the vendee is entitled to be allowed the ascertained reasonable value of the improvements, not exceeding the actual cost. *Mootz v. Petraschefski*, 315

VENDOR'S LIEN. See APPEAL, 28. SPECIFIC PERFORMANCE, 2, 3.

VERDICT. See APPEAL, 5, 6, 13. BROKERS, 2. EMINENT DOMAIN, 9. MASTER AND SERVANT, 15–18, 25. TRIAL, 8–11.

VERIFICATION. See PLEADING, 12.

VESTED RIGHTS. See MUNICIPAL CORPORATIONS, 9.

VOLUNTARY DISCONTINUANCE. See DISMISSAL AND NONSUIT.

WAIVER.

1. A waiver is the voluntary relinquishment of a known right, benefit, or advantage. *Voss v. N. W. Nat. L. Ins. Co.* 492

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2. Voluntary choice is the essence of waiver, and the doctrine of waiver is not necessarily predicated upon estoppel. *Ibid.*

Of breach of contract. See CONTRACTS, 21. INSURANCE, 7–12. SALES, 4, 5.

Of notice. See MUNICIPAL CORPORATIONS, 11.

WATER POWERS. See NAVIGABLE WATERS.

WATERWORKS. See ARBITRATION AND AWARD, 1, 4, 8. MUNICIPAL CORPORATIONS, 10–14.

WILFULLY. See CRIMINAL LAW, 1–6.

WILLS.

Probate: Contests: Counsel fees and disbursements.

1. Under ch. 397, Laws of 1901, being sec. 4041*a*, Stats. (Supp. 1906), the court having jurisdiction of the probate of a will is vested with a discretion in making an allowance to the proponent in will contests, and therefore, unless there is an abuse of discretion in that regard, the court's action cannot be disturbed on appeal. *Estate of Muellenschlader,* 32

2. On the whole record of a contest over the probate of a will, heard in the county, circuit, and supreme courts, it is *held* that there was no abuse of discretion in disallowing specific items of an executor's account, consisting of counsel fees and disbursements incurred in securing the probate of the will before he had qualified as executor and while he was merely proponent of the will. *Ibid.*

[3. Whether sec. 4041*a*, Stats. (Supp. 1906; Laws of 1901, ch. 397), vests in the county court only power to make such an allowance, and, that court having denied it, its action cannot be disturbed on appeal, not determined.] *Ibid.*

Construction: Bequests: Time of payment.

4. A testator devised his estate to a son with the condition that the son pay to his widow $800, "to be paid her as it becomes necessary for her needs." *Held,* that the element of time was annexed to the payment only and not to the gift itself, and that therefore the widow took the $800 as an absolute gift, she herself to determine the character of the needs and the time when payments were necessary to meet them. *Ohse v. Miller,* 474

Same: General rule.

5. Rules for the construction of uncertain clauses in wills yield to the cardinal rule that the words of a will are to be construed so as to give effect to the intention of the testator, which intention is to be ascertained from the language of the will itself, in the light of the circumstances surrounding the testator at the time of its execution. *Ohse v. Miller,* 474

Same: Advancements.

6. Testator gave to trustees the residue of his estate to be divided into as many equal shares or portions as he had children (there were two), and directed that there should be paid to a daughter, within one year after the probate of his will, one fourth of her share, and otherwise directed as to the disposition of the residue of her share. The will also provided that any advancements to his children "shall be added to and deemed a part of my estate in this will bequeathed and devised in trust," and that "in the division of said estate into shares, as hereinbefore provided, the [advancements] shall be deducted from the share

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of the child or children against whom such charges or charge shall be made." *Held:*

(1) The bequest to the trustees being of money and property belonging to the deceased at the time of his death, advancements made by the testator did not come to the trustees, since such advancements were not such property as belonged to the testator at the time of his death.

(2) The conception and intent of the language of the will was merely to direct such method of computation as that the proportioning of the actual property held by the trustees between the children should give to the one receiving less advances a proportionate superiority over the other child.

(3) The words used aptly expressed an intention that, as preliminary to the action of the trustees, the one-half of the estate attributable to the daughter should be ascertained by dividing the estate plus the advancement by two, one half for each child, and that the amount of the advancement to her should be deducted from the same one-half share, and the remainder pass to the trustees to be managed and divided by them in the proportions prescribed by the will. *Rose v. Ruggles,* 439

Rights and liabilities of devisees: Life estates: Enforcement of lien.

7. Where a devisee of lands accepts the devise and takes possession thereof under such devise, he becomes personally liable to pay a legacy charged thereon when it becomes payable by law. The situation of the devisee, then, is that of owner of the property subject to a lien thereon, which he had agreed to pay, and which may be foreclosed and enforced at any time after it falls due. *Steele v. Korn,* 51

8. A will which devises real estate to K. for life, with remainder over to his issue, and, if he should leave no issue, then the remainder over to testator's grandchildren who might be living at the time of K.'s death, is *held* to limit K.'s interest to his life. *Ibid.*

9. Testator devised lands to K. for life, with remainder over, and K. took possession thereof. Plaintiff, a legatee whose legacy was chargeable on the same lands, brought suit to foreclose and enforce her lien. It appeared that K.'s estate in the lands would, in all probability, sell for a meager sum on account of its uncertain duration, and for the same reason a separate sale of the estate in remainder would probably fail to bring a reasonably fair price, and the selling of such interests separately would operate to the injury of all parties interested in the land. *Held,* under the circumstances presented, that the court should adopt the course which, in freeing the property from the lien of plaintiff, would least threaten loss to the estate and which would promote the interests of all owners, and to accomplish this result the whole property in fee simple should be sold and converted into its equivalent in money and dealt with in this form as realty. *Ibid.*

10. In such case the value of K.'s estate in the whole proceeds should be ascertained under the rules for computing the value of life estates, and be taken out of the selling price of the whole estate and applied to the payment of plaintiff's judgment, any balance after satisfying the judgment to be paid to K. as the absolute owner thereof. *Ibid.*

11. In such case, in the event that the amount found to be the value

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of K.'s estate is insufficient to satisfy plaintiff's judgment, then a sum which, when added to K.'s estate, will be sufficient to satisfy the judgment, should be taken out of the estate in remainder. *Ibid.*

12. In such case whatever estate in remainder is not required to satisfy the judgment should be placed in charge of a trustee to administer and hold for accumulation for the persons entitled thereto at the time of the death of K. *Ibid.*

13. On a motion to correct the record it is *held* that the interest of K. in the lands involved is as stated in *Korn v. Friz*, 128 Wis. 428, but that such holding in no way affects the correctness of the decision on this appeal and does not call for any modification of the mandate. *Ibid.*

WITNESSES.

Attendance. See HOMICIDE, 1.

Competency. See ARBITRATION AND AWARD, 5. EVIDENCE, 5, 21.

Same: Transactions with persons since deceased. See EVIDENCE, 13.

1. In an action on a promissory note by the personal representative of the deceased payee, defendant is an incompetent witness under sec. 4069, Stats. (1898), and his evidence being within the prohibitions of that section was erroneously admitted over plaintiff's objection. *Jackman v. Inman,* 30

Same: Agent of party.

2. Plaintiff's evidence as to the acts and declarations of his agent, had in the presence and hearing of the defendant, is admissible, although the agent had since died. *Mariner v. Wiens,* 637

Examination: Cross-examination.

3. Where the servant of defendants was called as a witness for the plaintiff, the fact that the servant was afterwards called and fully examined as a witness for defendants, and was not an adverse or unwilling witness, sufficiently cures any alleged error in limiting his cross-examination when called as a witness for the plaintiff. *Miller v. Neale,* 426

Credibility. See INSTRUCTIONS TO JURY, 14. MASTER AND SERVANT, 2.

4. While the appearance and manner of a witness is of importance in the consideration of the issue as to the intelligence of a party when taken in connection with other evidence affecting his credibility or his physical or mental condition, yet standing alone, or existing in connection with evidence which *prima facie* shows ordinary intelligence, appearance and manner alone cannot be invoked to sustain a verdict based on a conclusion that the party was not of ordinary intelligence. *Rahles v. J. Thompson & Sons Mfg. Co.* 506

WORDS AND PHRASES.

Actions and proceedings, in statute. See COURTS, 1.

Agent having charge of or conducting any business of such corporation within this state, in statute. See PROCESS, 1.

At law or in equity, in statute. See COURTS, 1.

Authority, in statute. See RAILROADS, 1.

Contingent claim. See EXECUTORS AND ADMINISTRATORS, 2.

Criminal action. See PENALTIES, 5.

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Establish, in instruction to jury. See INSTRUCTIONS TO JURY, 13.
Fine. See PENALTIES, 3, 6.
Good and sufficient conveyance, in contract. See VENDOR AND PURCHASER, 13.
Heat of passion. See HOMICIDE, 4, 5.
Holder in due course. See BILLS AND NOTES, 6, 7.
Personal service, of summons. See PROCESS, 3.
Preference. See BANKRUPTCY, 4–7.
Present security. See BANKRUPTCY, 4.
Public benefit. See NAVIGABLE WATERS, 3.
Public use. See NAVIGABLE WATERS, 3.
Required, in statute. See JUDGES, 3.
Substantial performance, of contract. See CONTRACTS, 14–17.
Suspicion. See FRAUDULENT CONVEYANCES, 1.
The public. See NAVIGABLE WATERS, 2.
Waiver. See WAIVER.
Wilfully, in statute. See CRIMINAL LAW, 4–6
Without the state, in statute. See DISCOVERY, 6.

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